

CASES DETERMINED
BY THE
SUPREME COURT
OF
THE STATE OF MISSOURI
AT THE
OCTOBER TERM, 1835.

MORLEY V. WEAKLEY *et al.*, *Appellants*.

1. **Street Improvements : TAX-BILLS, AMENDMENT OF.** It was competent for the city engineer of the city of St. Joseph, after making out tax bills for macadamizing, curbing and guttering two streets, on discovering that the block had been subdivided into lots, to correct and certify anew the bills, and he could so do, whether he was out of office or was holding the same as his own successor.
2. — : — : **PLEADING.** Although the petition stated that each lot was charged for the work done in front of it, and that the engineer computed the cost of the work done "in front of and adjoining the lot," and not for the proportionate share of the cost of the whole work, yet, as in this connection, the cost is alleged to have been that which is chargeable to the whole lot, and that the amount assessed was the proportionate cost of the work under the act authorizing it, and which act is sufficiently referred to, the petition is sufficient.
3. **Ordinances : MAYOR : CONTRACT.** The city ordinances did not require the mayor to act separately in awarding the contract, but that he should act in conjunction with the city council, as its presiding officer.
4. **Street Improvement : BIDS, ADVERTISEMENT FOR.** It was not necessary that the advertisements for bids should state the amount of work to be done where they showed the streets between which

Morley v. Weakley.

and on which the work was to be done and stated the different classes of work.

5. ———: SPECIFICATIONS: ORDINANCES. The ordinances, with respect to macadamizing, curbing and guttering, provide in detail, as to the material and manner of doing this class of work, and the general ordinance, requiring a plan or profile of the work with specifications to be on file where bids are advertised for any public improvement, has no application. The latter ordinance should not be construed to require the city engineer to do that by specifications which is clearly stated in the ordinance.
6. ———: LOST BID: EVIDENCE. Where a bid for macadamizing, etc., a street is lost, the loss being shown, parol evidence of its contents is admissible and the fact that no record or an imperfect account of the bid was kept, will not prevent plaintiff from showing its true contents.

Appeal from Buchanan Circuit Court.—HON. H. S. KELLEY, Special Judge.

AFFIRMED.

Spencer & Hall for plaintiffs in error.

(1) The original assessment of the cost of the work on the whole block was void and so were the original tax bills based on the assessment. *Kemper v. King*, 11 Mo. App. 584; *Neenan v. Smith*, 50 Mo. 525; *Weber v. Schergens*, 59 Mo. 389. A void tax bill cannot be amended. (2) Mistakes as to form in tax bills of the character of those in suit can be corrected only by the officer who issued the bill. *Kiley v. Oppenheimer*, 55 Mo. 375; *Kiley v. Cranor*, 51 Mo. 541. (3) The petition failed to state a cause of action; it was framed on the theory that each lot was liable for the work done in front of it. Revised Charter and Ordinances of 1869, of St. Joseph, page 47; *Eyerman v. Hardy*, 8 Mo. App. 530; *City, etc., v. Clemens*, 49 Mo. 554; *Weber v. Schergens*, 59 Mo. 393; *Sill v. Chicago*, 29 Ill. 33. (4) The failure of the engineer to comply with the requirements of the ordinance vitiates the contract and the subsequent proceed-

 Morley v. Weakley.

ings under it. *Brady v. New York*, 20 N. Y. 312; *Kiley v. Oppenheimer*, 55 Mo. 375. (5) In accepting and approving bids, the mayor and council should act jointly. The mayor must sign all ordinances or motions approving or accepting any bid. *Thompson v. Boonville*, 61 Mo. 283; *Saxton v. St. Joseph*, 60 Mo. 158; *Irvin v. Devors*, 65 Mo. 627; *Saxton v. Beach*, 50 Mo. 489; *Graham v. Carondelet*, 33 Mo. 268. (6) The contracts under which the whole work in suit was done are void, because the ordinances directed the engineer to contract for the whole work and the engineer permitted property owners to reserve a portion of the work. *Eyerman v. Hardy*, 8 Mo. App. 312. (7) The record could not be changed, modified, or contradicted by parol evidence. Besides, the only way in which the mayor could evidence his assent was by signing the motion, record, or resolution. Cases, *supra*.

B. R. Vineyard for respondent.

(1) To recover for street improvements under the charter of the city of St. Joseph, the contractor can look alone to the property abutting on the street improved. The charter prohibits the city from becoming liable, "in any manner whatever," for work of this character. Acts 1865, 435; *Kiley v. City of St. Joseph*, 67 Mo. 491. (2) A substantial compliance only by the municipal authorities with the charter and ordinances need be observed in order to furnish a right of recovery to the contractor. *City of St. Joseph v. Anthony*, 30 Mo. 542; *City of St. Louis v. Denave*, 44 Mo. 139. (3) The tax bills made out a *prima facie* case. *Neenan v. Smith*, 60 Mo. 294; *Ess v. Bouton et al.*, 64 Mo. 105; Acts 1865, p. 435, sec. 5; *City, etc., v. Armstrong*, 38 Mo. 33. (4) The engineer had the right to make the amended tax bills. *Kiley v. Cranor*, 51 Mo. 541; *Kiley v. Oppenheimer*, 55 Mo. 375; *Pendergrast v. Rich-*

Morley v. Weakley.

ards, 2 Mo. App. 192; *Gibson v. Bailey*, 9 N. H. 168. And the amendment related back to the time of the issue of the original bills and as against the lot owners became valid as of that date. *Webster v. Blount*, 39 Mo. 500; *Kitchen v. Reinsky*, 42 Mo. 436. (5) It was not necessary that the mayor should sign the motion or resolution on which the awards were made. *Knight v. Ry.*, 70 Mo. 236. Besides, for anything that appears to the contrary, the mayor's assent was entered of record. (6) There is nothing in the city charter, and there was nothing shown by any ordinance in evidence requiring a record to be kept of the prices of any bid for street work. The record shows the action of the council and this was all that was necessary. *Bank v. Dandridge*, 12 Wheat. 64; *Smith v. County Com.*, 42 Me. 395. (7) The Supreme Court will not remand a case for a new trial, where the only error is that the judgment below is for too much, especially where the party in favor of whom the judgment is rendered, offers to remit the excess, but will correct the judgment. *Tilford v. Ramsey*, 43 Mo. 420; *Nicholson v. Couch*, 72 Mo. 209; *Miller v. Hardin*, 64 Mo. 545; *Clark v. Bullock*, 65 Mo. 535; *Peck v. Childers*, 73 Mo. 484. (8) The court, in construing the charter of St. Joseph, has decided that including in a tax bill, by the city engineer, items not properly therein will not invalidate the bills, nor stop the interest on that part properly included. *Neenan v. Smith*, 60 Mo. 295; *First Nat. Bk. v. Amholdia*, 63 Mo. 229. (9) The action was on the tax bill, and not on the contract, and the latter was not required to be set out. *City, etc., v. Hardy*, 35 Mo. 265.

BLACK, J.—This suit was at first based upon two tax bills against the same block of ground in the city of St. Joseph, one for macadamizing, curbing and guttering Sixth street, and the other for like work on Seventh street. It was discovered that the block had been sub-

Morley v. Weakley.

divided into lots. Thereupon the engineer made out new or amended tax bills against the lots, and upon these amended bills the counts of the amended petition are based.

1. By the charter (Acts of 1865, page 435, section 5), the tax bills are to be made out and certified by the officer having charge of the work. This was done, but, thereafter and before the new bills were certified, the term of office of the engineer expired, and he was appointed his own successor, and certified the amended bills whilst acting under the new appointment. If he had not been appointed his own successor, he could have corrected any irregularities and certified the bills anew. *Kiley v. Cranor*, 51 Mo. 541; *Kiley v. Oppenheimer*, 55 Mo. 374. That these tax bills, as first certified, were void, may be conceded, still, it was entirely competent for the engineer who had charge of the work, which was done while he was in office, to correct and certify anew the bills, in or out of office. It was his duty to make the correction.

2. Objection was made to the introduction of any evidence on the ground that the petition was wholly defective in this, that it showed each lot was charged for the work done in front of it; and not for the proportionate share of the cost of the whole work. It is true, the petition states that the engineer computed the cost of the work done in "front of and adjoining the lot," etc., but in the same connection this cost is alleged to have been that which was chargeable to said lot under said act, and the further allegation is, that the amount assessed as a special tax by the engineer was the proportionate cost of the work under the act, reference to which is sufficiently made. In view of all this, the petition is well enough.

3. The contracts made by the city with the plaintiff, it is contended, are void. (1) Because the resolutions awarding the same were not signed by the mayor or

Morley v. Weakley.

specially approved by him; (2) because the advertisements for bids did not state the amount of the work to be done, and (3) because no plan or profile of the work was on file in the office of the engineer. One of the general ordinances read in evidence required all contracts to be awarded by the mayor and council to the lowest responsible bidder. After the engineer had advertised for and received the bids, the contracts were awarded to plaintiff by resolutions duly entered of record in the proceedings of the council. While these resolutions were not signed by the mayor, still it is found by the jurors that he was present at these sessions of the council, and that he and the council thus jointly acted in the matter. The various ordinances, general and special, under which the work was done, were all approved by the mayor. The mere matter of awarding the contracts, under existing laws, was not the exercise of legislative functions, so that the authorities cited by plaintiff in error have little or no application here. Moreover, we do not understand the ordinances to require the mayor to act separately in awarding contracts, but rather that he shall act in conjunction as presiding officer.

It was not necessary that the advertisements for bids should state the amount of work to be done. They did show in each case between what streets and on what streets the work was to be done, stating the different classes of work, and that was sufficient. The ordinance which required a plan or profile of the work, accompanied with specifications, to be on file when bids were advertised for, is general and relates to "any public improvement." The ordinance with respect to macadamizing, curbing and guttering, provides in detail of what material these classes of work shall be made, how the stone shall be placed and how prepared. In short, they are themselves specifications, and there was no need of anything further to give either bidders or the public

Taylor v. The Missouri Pacific Railway Company.

full information. The ordinance requiring plans and specifications can have full application in matters of grading and the like, where they are essential to give bidders a full understanding of the work to be done and the manner of doing it, but it should not be construed to require the engineer to do that, by way of specifications, which was clearly stated in the ordinance.

4. The bids were made by specific prices per square for macadamizing and for guttering, and per lineal foot for curbing. In one instance the bid was lost. The loss being shown, parol evidence was properly admitted of the contents. The fact that the city council and engineer failed to keep a record, or kept an imperfect account of the bid, did not prevent plaintiff from showing its true contents.

5. The tax bill on lot twelve, contains an item of \$47.80, and that on lot seven an item of \$15.12 for work at the intersection of streets, the validity of which charges is challenged on various grounds, but they need not be considered, as the plaintiff offers to remit the amount of these items with the interest thereon. Plaintiff will be permitted to remit \$48.60 from the judgment on the first count, and \$15.25 from the fourth. This done, the judgment is affirmed. As the appellant comes here to get this correction, the costs on this appeal will be taxed against respondent. The other judges concur.

TAYLOR, *Administrator*, v. THE MISSOURI PACIFIC
RAILWAY COMPANY, *Appellant*.

Railroad: ACTION FOR DEATH OF PERSON: CONTRIBUTORY NEGLIGENCE.

One who recklessly or carelessly goes upon the track of a railroad company, without looking or listening for an approaching

Taylor v. The Missouri Pacific Railway Company.

train, and is thereby killed, when, by looking or listening, he would have been apprised of the approach of the train, is guilty of such contributory negligence as to preclude a recovery in an action for his death, notwithstanding the train was, at the time running at a rate of speed forbidden by an ordinance of the city in which the accident occurred, and also failed to ring its bell.

Appeal from St. Louis Court of Appeals.

REVERSED.

E. A. Andrews for appellant.

(1) The demurrer at the close of plaintiff's case should have been sustained, because the plaintiff on her evidence was not entitled to recover. *Maher v. Pacific Railroad*, 64 Mo. 269, and authorities there cited; *Harlan v. St. L., K. C. & N. Ry. Co.*, 64 Mo. 480, and authorities there cited; *Hallihan v. H. & St. Jo. Ry. Co.*, 71 Mo. 113, and authorities there cited; *Lenix v. Mo. Pac. Ry. Co.*, 76 Mo. 86, and authorities there cited; *Powell v. same*, 76 Mo. 80. (2) The demurrer at the close of the whole case should have been sustained, because the plaintiff, on all the evidence, was not entitled to recover. Same authorities. (3) The first instruction given at the request of the plaintiff was erroneous. (4) The third instruction given at the request of the plaintiff was erroneous in this, that it was not supported by necessary allegations in the petition, or by the evidence, and is in conflict with settled law. Same authorities cited.

A. R. Taylor for respondent.

(1) Sullivan was guilty of no negligence in approaching and attempting to cross the track. He used his senses of sight and hearing, without avail, to discover the approach of a train, because there was an ob-

Taylor v. The Missouri Pacific Railway Company.

struction both to his view and his ability to hear.

(2) There is no evidence that Sullivan could or did hear the train until notified by McKane of its approach.

(3) If the deceased did use his senses of sight and hearing, at the time of approaching and stepping upon the track, and at that time could neither see nor hear the approaching train, and if then, but for the unexpected and unauthorized speed of the train, he could safely have passed the track, he was guilty of no negligence. *Harlan v. Ry. Co.*, 64 Mo. 482; *Fletcher v. Railroad*, 64 Mo. 490; *Henze v. Railroad*, 71 Mo. 640.

(4) The true rule as expounded by the court is, (a) that a person who attempts to cross a railroad track must, before doing so, if a pedestrian, use his senses of sight and hearing in an ordinarily prudent manner. And the law, in the first instance, presumes in favor of the injured person that he did this thing.

(b) That after such pedestrian has used such lawfully required diligence, in approaching and getting upon the track, he has a right to assume that the railroad company will only operate its train according to the provisions of a law regulating the same, and may proceed to cross the track upon such assumption.

(5) While the negligence of the railroad in failing to obey the law as to the operation of its trains will not make it liable where injury is caused by the failure of the injured person to use due care, yet where the injured person has used due care, and his only fault was that he did not anticipate the negligence or wrongful act of the company, it cannot be said that he was guilty of contributory negligence. It is not contributory negligence to fail to anticipate that the servants of the railroad would run the train in violation of the law. 2 Thomp. on Neg., p. 1172, secs. 18, 19, and cases cited. Where a pedestrian listens and looks for an approaching train, and having exercised what care he might, he relies upon an observance by the railroad of the law, and proceeds to cross the track and is injured, he can recover. Sec.

Taylor v. The Missouri Pacific Railway Company.

19, *supra*; *Ernst v. Railroad*, 35 N. Y. 28-9; *Railroad v. Hagan*, 47 Pa. 248. . As the evidence tended to show that Sullivan did use the diligence required by law, and fell a victim to the fact that he could not and did not anticipate that defendant would violate the law, in running its train at an excessive rate of speed, it follows necessarily that the defendant should be held liable. *Henze v. Railroad, supra*.

HENRY, C. J.—This action was originally commenced by the intestate, Margaret Sullivan, to recover the statutory penalty of five thousand dollars for the death of her husband, in 1878, alleged to have been caused by the negligence of the defendant in operating a train of its cars on its track near the union depot in the city of St. Louis. Plaintiff had a judgment, which, on appeal to the St. Louis court of appeals, was affirmed *pro forma*, and defendant has prosecuted an appeal to this court.

The only witness introduced by plaintiff who saw the collision was Louis C. McKane, and his testimony was to the effect that Sullivan was in the employment of the Union Railway and Transit company, as a lamp-lighter, and that it was his duty to put up lamps in the evening and take them off the targets in the morning in the St. Louis Union Depot yards, which extend from Twelfth to Twenty-first streets, and contain thirteen parallel tracks, running a few feet from each other, and connected by many switches upon and from the targets of which Sullivan put up and took down the lamps, which he kept in a shanty a little west of the Fourteenth street bridge, which crosses these tracks. That deceased was injured between six and seven o'clock, on the morning of the twenty-ninth of October, 1878. That at the time he was injured, witness was between two and three hundred feet east of him, walking between tracks twelve and thirteen. That deceased was coming from

Taylor v. The Missouri Pacific Railway Company.

the northwest, "walking kind of down the track" over toward his shanty. That witness saw him get on the track and saw the train coming from the west, and threw up his lamp and hallooed to Sullivan to get off the track. Sullivan had just then stepped upon the track and was walking down, and seemed to be going across the track, and when witness hallooed to him, Sullivan looked and threw his body off of the track. The engine was then within fifty or one hundred feet of him. He stepped onto the track, walked a few steps down, and was still going right on. Sullivan was between the witness and the engine which struck him, and witness and Sullivan were facing each other. McKane thought that the train was running fifteen miles an hour, and heard no bell ringing on the engine. He also testified that when Sullivan stepped upon the track he could have seen up the track from which the train was coming over seventy-five or one hundred feet, but that he could not have seen the train until he got upon the track, owing to the obstruction presented by some cars on a switch track near by.

There is no evidence tending to prove that Sullivan, before or after he stepped upon the track, looked or listened for an approaching train. Respondent's counsel insists that he did look, but we have carefully examined the testimony and find nothing in it to justify the contention. "He had his head up, looking along the track, as he stepped upon it," says the counsel, but the testimony is that he stepped upon the track from behind some cars on a side-track, started in a southeast direction diagonally across, and rather down the track, towards his shanty, and never turned his head toward the train coming from the west until McKane called his attention to it. The attorney for plaintiff asked the witness the following suggestive question: "You say you saw him when he approached the track, and he looked up and down the track?" But the witness had not said

Taylor v. The Missouri Pacific Railway Company.

it, nor did he ever say it, but studiously avoided testifying to that fact.

At the close of plaintiff's case, the defendant asked the court to direct a verdict for defendant, which the court refused. The case, in its main features, closely resembles that of *Harlan v. Ry. Co.*, 64 Mo. 480, in which Judge Napton, delivering the opinion of the court, said: "A person who goes on a railroad track, or proposes to cross it, must use his eyes and ears to avoid injury. A neglect of regulations in regard to bell ringing may amount to negligence in law, on the part of the railroad employes, but that does not absolve strangers, who propose to cross the track, from ordinary care." In that case, the deceased stepped upon the track from behind some cars standing on another track, which obstructed his view of the engine which struck him. The bell was not rung, and it was impossible, after deceased got upon the track, to stop the train in time to avoid striking him.

There was no evidence in the case at bar tending to prove that the deceased ever looked or listened for an approaching train, but, on the contrary, the testimony of McKane clearly proves that if he had paused a moment and looked or listened, he would have seen or heard the train. When he got upon the track, the engine which struck him was within fifty or one hundred feet of him, and had he then stopped and looked, there was nothing to prevent him from seeing it, and if he had listened, without looking, he would have heard it. If he looked he must have seen the train, and determined to take the chances of crossing the track without being struck. The negligence of the company in running the train at a speed forbidden by the ordinance of the city, and in not ringing the bell, may be conceded, although the only evidence that the bell was not rung is that of McKane, who testified that he did not hear it; yet, if Sullivan recklessly or carelessly went upon the

Taylor v. The Missouri Pacific Railway Company.

track, without looking or listening for an approaching train, when by looking or listening he would have been apprised of its approach, he was guilty of such contributory negligence as precludes a recovery. It is utterly impossible to distinguish this from similar cases in which this and other courts have held that there could be no recovery. *Harlan v. Railroad, supra*; *Maher v. Railroad*, 64 Mo. 269; *Zimmerman v. Railroad*, 71 Mo. 476; *Hallihan v. Railroad*, 71 Mo. 113; *Lenix v. Railroad*, 76 Mo. 86; *Powell v. Railroad*, 76 Mo. 80; *Railroad v. Heileman*, 49 Pa. St. 60; *Railroad v. Beale*, 73 Pa. St. 504; *Railroad v. Crawford*, 24 Ohio St. 631; *Dascomb v. Railroad*, 27 Barb. 221; *Wilcox v. Railroad*, 39 N. Y. 358; *Railroad v. Houston*, 95 U. S. 697. The cars on the side-track which prevented Sullivan from seeing the train which struck him also prevented the men on the train from seeing him, until he came upon the track, and, running at fifteen miles an hour the train could not have been stopped within a shorter distance than five hundred feet, as McKane testified.

Sullivan had for some time been employed in the St. Louis Union Depot yards, and his business required him daily to pass over and among the numerous railroad tracks laid there. He knew the danger to be apprehended from passing trains and engines, and the care demanded of those whose business required them to pass along and over those tracks. By frequent exposure to danger, however, men become indifferent to it, and hazard their lives by taking risks which others less accustomed to the dangers would carefully avoid. Sullivan, no doubt, lost his life by his indifference to perils with which he had become familiar. Upon no other theory can his conduct be explained, and without overruling numerous adjudications of this court, which are in entire harmony with the best considered cases of other American and English courts, we cannot affirm this

Taylor v. The Missouri Pacific Railway Company.

judgment. It is, therefore, reversed. All concur except Black, J., who dissents.

BLACK, J., DISSENTING.—The deceased had, beyond all doubt, the right to cross over the tracks, and it became and was his duty so to do. The surrounding circumstances, as they existed at the time of the injury, are important elements in the case. Dougherty was, at the same time and place, engaged with a switch engine in setting cars on one of their tracks. Just then a stock train of the North Missouri road passed, and then came the defendant's train. The witness, McKane, hallooed. Sullivan, the deceased, then, it is said, turned his head to the right, saw the train, and threw his body off, but not so as to prevent being hit. Numerous objections were interposed to the evidence of this witness, and it is not strange that some of his answers are not direct. A part of his examination was as follows: "A. Yes, sir, he was coming from northwest going in kind of a southeast direction, and he stepped on the track, walked a few steps down, and was still going right. Q. As he stepped on the track and you hallooed, did he have his head up, looking around, or down? A. He seemed to be walking like any other man. Q. How was he looking, how was his head, his face—up, or down? A. Yes, his face was up, looking along the track. Q. How far could he see from where he was when he stepped upon the track? A. He could not see more than seventy-five nor over a hundred feet. Q. That was on account of these cars being in his way that were moving over on the other track? A. Yes. Dougherty was pulling in the Yeager mill cars. Q. Could he see the approaching train on account of these cars? A. The way I seen him coming on the track, he could not, until after he got on the track that he was struck on. From the way he entered the track from the time that I first seen him, I

Taylor v. The Missouri Pacific Railway Company.

seen him when he first got on what they call the accommodation track."

This testimony surely tends to show that the deceased was using his eyes and ears, for he was, it is said, walking with his head up, looking along the track, and he seems to have heard the witness. There is no evidence, certainly none disclosed by the abstracts, tending in the least to show any want of care prior to the moment of stepping on the track. After that, he was going about his business, carrying his lamp, apparently using his senses of sight and hearing. The train, it is said, was within fifty or one hundred feet of him when he stepped on the track, and was running at a rate of speed, if the witness tells the truth, which was in flagrant violation of the ordinance. Now, if the deceased had seen the train in time to get off, it was his plain duty so to do, though it was running at an unlawful speed. It is clear that he did not see it in time. At such a place and under such circumstances, as are here disclosed, may not the employe, who must promptly discharge his duties, rely to some extent, at least, upon the fact that others, having equal rights to use the same ground at the same time, will give some heed to the plain dictates of position law? If he cannot do this, then there is not much protection against such violations of the law. Ordinary eyes and ears are not on the alert for violation of the law.

It is no far fetched conclusion to say, from this testimony, that this man was killed because of the unlawful rate of speed at which the train was going. Quite likely the engineer did not see him in time to stop, and why? Because he was committing a gross act of negligence. If Sullivan was using that care, which a prudent person would have used in a like situation and under like circumstances, he was not guilty of negligence. This question was submitted to the jury fairly enough

The Merchants' Insurance Company v. Hill.

by the court on its own motion. Defendant asked no instructions, save demurrers to the evidence. The jurors have twice found for the plaintiff. In my opinion, there was sufficient evidence upon which to submit the cause, and the jurors might well have found for the plaintiff, if they believed the plaintiff's testimony. To determine whether the evidence was true or not was their duty, not ours.

In my opinion, the judgment should be affirmed.

THE MERCHANTS' INSURANCE COMPANY V. HILL, *Appellant.*

1. **Construction of Statute :** REVISED STATUTES, SECTION 736. Section 736, Revised Statutes, 1879, substantially the same as General Statutes, 1865, section 11, page 328, the effect of which is that upon a *nulla bona* return to an execution against a corporation, execution may issue against any stockholder to the extent of the amount of the unpaid balance of his stock, by order of the court upon motion filed in open court after sufficient notice, is applicable to the stockholders of the Excelsior Insurance Company created by the act of February 9, 1859. Laws, p. 74.
2. **Constitutional Law :** RETROSPECTIVE LEGISLATION : IMPAIRMENT OF OBLIGATION OF CONTRACT. Section 736, Revised Statutes, 1879, is not retrospective and does not impair the obligation of the contract created by act of February 9, 1859. Laws, p. 74. It creates no new or additional liability or burden and disturbs no vested rights, but creates a mere supplemental proceeding incident to a change in the remedy which it was competent for the legislature to provide.
3. **Appeal from the St. Louis Court of Appeals.** Where an appeal lies to the Supreme Court from the St. Louis court of appeals only because constitutional questions are involved, only such questions will be considered by the former court.

Appeal from St. Louis Court of Appeals.

The Merchants' Insurance Company v. Hill.

AFFIRMED.*N. Holmes* for appellant.

(1) The general laws of 1865, section 11, page 328, and 1879, section 736, of the corporations act were not intended to affect the special and private act of February 9, 1859 (Laws, p. 74), creating the Excelsior Insurance Company, or to apply to this corporation, its stockholders, for the following reasons: (a) The principle is, that a general statute treating the subject in a general manner, and not expressly contradictory to the special act, shall not be considered as intended to affect the more particular and positive provisions of it, unless it is absolutely necessary to give the general statute such a construction in order that its words shall have any meaning at all. *State ex rel. Vastine v. McDonald*, 38 Mo. 529; *State v. Alexander*, 23 Mo. 508; *State v. Macon Co.*, 41 Mo. 458-9; *State v. Ins. Co.*, 47 Mo. 149; *State v. Fiola*, 47 Mo. 310; Sedgw. on Stat. & Const. Law, 123; Smith's Stat. & Const. Law, sec. 780; *Fairchild v. Hunt*, 71 Mo. 534. (b) Such a construction of these general laws of 1865 and 1879, as would make them apply to this special and private act would make these laws unconstitutional. *Shaw v. Gregoire*, 41 Mo. 415; *Ins. Co. v. Flynn*, 38 Mo. 483; *Prov. Sav. Inst. v. Bathing Rink*, 52 Mo. 557; *Fairchild v. Hunt*, 71 Mo. 531; *Woort v. Winnick*, 3 N. H. 477; *Society v. Wheeler*, 2 Gall. 105; Sedgw. on Stat. & Const. Law, 188; Smith's Stat. & Const. Law, secs. 149, 157, 172, 368, 533; Const. of Mo. 1865, art. 1, sec. 28; Const. of Mo., art. 2, sec. 15.

G. M. Stewart also for appellant.

(1) Section 11 of chapter 34, of General Statutes, 1865, was an amendment of the act of 1855, and was so

The Merchants' Insurance Company v. Hill.

considered by the law makers. See Revised Statutes, 1865, section 11, chapter 52, marginal note, "Revised Statutes, section 13, page 72, amended," section 11, page 328. If it was an amendment appellant could not be affected by any of its provisions. The act creating the defendant corporation was a special act and could not be repealed or modified or affected by a general law. *St. Louis v. Alexander*, 23 Mo. 483; *St. Louis v. Ins. Co.*, 47 Mo. 146. The statutes of 1865 and of 1879 are general statutes, while that creating the Excelsior Insurance Company is special, and hence, if there be inconsistency between them, the latter will prevail, unless the general law contains an expression of the manifest purpose of the legislature to repeal the special act. *State v. McDonald*, 38 Mo. 529; *State ex rel. Baker v. Fiala*, 47 Mo. 310; *Howard v. Clark*, 43 Mo. 344; *Dunscourt v. Maddox*, 21 Mo. 144; *State v. Mills*, 5 Vroom, 177; *State v. Shepherd*, 74 Mo. 310. No such purpose appears in the law of 1865 or 1879. (2) If, however, it be held that the act of 1865 does reach a corporation created as was the Excelsior Insurance Company, we insist that it is unconstitutional, as it was retroactive in its operation and disturbs vested rights by changing the contract. The correctness of this proposition depends upon the relative position and rights of a shareholder in an action against him by a creditor for his unpaid stock, in the absence of any statutory provision determining them, and under the statute upon which this motion is based. In the absence of a statutory remedy, a creditor must resort to his bill in equity. *Vose v. Grant*, 15 Mass. 505; *Spear v. Grant*, 16 Mass. 9; *Wood v. Dummer*, 3 Mason, 308; *Mann v. Pentz*, 3 N. Y. (3 Coms.) 415, 422; *Addler v. Milwaukee H. Co.*, 13 Wis. 57.

Pattison & Crane for respondent.

(1) No constitutional provision is violated by the

The Merchants' Insurance Company v. Hill.

enactment of section 736, Revised Statutes, 1879. The charter, by omitting the provisions of the law of 1855, simply left the liability of the stockholder as at common law, which was to pay the full amount subscribed. This was the contract made by the subscriber by the very act of subscribing. If the contract is impaired at all, it must be because a method has been provided for enforcing this liability, different from that which existed at the time the liability was incurred. A change of the remedy for the violation of a contract, or a change in the method of enforcing a contract, does not impair its obligation. Story on Const. (4 Ed.) sec. 1385, note 3, on page 245, and notes 2 and 3, on page 246; *McElrath v. Ry. Co.*, 55 Pa. St. 189, 204; *Bronson v. Kinzie*, 1 How. 316. (2) In any event, appellant is in no condition to avail himself of the constitutional defence, he having subscribed for his stock nearly a year after the adoption of General Statutes, 1865, in which this provision is first found. His liability was governed by the law in force at the time he subscribed. *Fairchild v. Hunt*, 71 Mo. 526. The law of 1865 was applicable to appellant, as it was the law in force when he became a stockholder. *Railroad Co. v. McClure*, 10 Wall. 511; *Stanley v. Stanley*, 26 Me. 191. (3) The only question which this court will consider is the constitutional one. As to all others passed upon by the court below, the decision of the court of appeals is final. This is settled by the decision of this court in *Eyerman v. Blakesley*, 78 Mo. 145, which is in harmony with the view taken by the United States Supreme Court (*Spear Fed. Judiciary*, p. 594, *et seq.*)

BLACK, J.—This is an appeal from the St. Louis court of appeals affirming the judgment of the circuit court, by which an execution was awarded against the defendant for the amount found to be unpaid upon stock by him held in the Excelsior Insurance Company, and against which the plaintiff had obtained judgment. De-

The Merchants' Insurance Company v. Hill.

fendant contends that section 736, Revised Statutes, by authority of which the execution was awarded, does not apply to stockholders of that corporation, and if in terms it does, then it is unconstitutional, because the law is retrospective and impairs the obligation of contracts.

1. The Excelsior Insurance Company was created by the act of February 9, 1859 (acts of 1859, p. 74), with such rights, privileges and restrictions as were conferred upon the Washington Insurance Company by the act of March 3, 1857, with the exception of so much of section eight of said act as declares the same to be a public act and exempts said corporation from the operation of section eighteen, article one, of the general laws of 1855, concerning corporations. Section eight of the act creating the Washington Insurance Company (Acts of 1857, p. 545), declares that that corporation shall be exempted from the operation of sections seven, thirteen, fourteen, fifteen, sixteen and eighteen, of article one of the general laws of 1855 concerning corporations. "and said sections shall be deemed repealed so far as concerns the corporation hereby established." These sections seven and thirteen to sixteen are, therefore, to be regarded as repealed as to the Excelsior Insurance Company and not applicable to it. The seventh provides that the charter of every corporation shall be subject to amendment and repeal by the legislature. The thirteenth created what is known as the double liability of stockholders in favor of creditors, "unless otherwise specified in their charters," and provides that the property of every stockholder "shall be liable to be taken on execution to an additional amount equal to that of the amount of his stock and no more for all debts of the corporation contracted during his ownership of such stock," etc. This and the other sections, in substance, provide that the officer having the execution shall first certify that he can find no corporate property,

The Merchants' Insurance Company v. Hill.

then give forty-eight hours notice to the stockholder, when he may levy upon the property of the latter, unless he disclose corporate property. After such demand and notice the creditor is also given, at his election, an action against the stockholder.

Now, section 736 Revised Statutes, is substantially the same as section eleven, page 328, General Statutes, 1865, the effect of which is, that upon a *nulla bona* return to an execution against a corporation, execution may issue against any stockholder to the extent of the amount of the unpaid balance of his stock, by order of the court, upon motion filed in open court and after sufficient notice. This section is without restriction and applies to *any corporation* and to *any stockholder*. It points out a procedure essentially different from that given by those sections of the general laws of 1855, the prevailing feature of which was to create the additional liability to creditors, and to give the remedy therefor. Whether under those sections the creditor could, or could not, reach an unpaid balance due upon the stock subscription to the corporation we do not regard as essential to determine in this case. The statute of 1865 is practically a new one and in view of the constitutional and legislative enactments passed since this corporation was created upon the subject of the liability of stockholders, we have no doubt but it applies in terms to the stockholders of the Excelsior Insurance Company. If the charter of that corporation pointed out any proceeding by which the creditor could reach the balance actually due upon the stock when the corporation became insolvent, we should halt before coming to the conclusion before expressed, but regarding those sections of the general laws of 1855 as repealed, so far as this corporation is concerned, there is nothing in the statutes of 1865 and 1879 inconsistent with the charter, and we do not regard the authorities cited as having any direct bearing upon the question, though the Excelsior

The Merchants' Insurance Company v. Hill.

Insurance Company was created by a special and private act.

2. This section eleven of the General Statutes, 1865, was passed and became a law March 19, 1866 (Laws of 1865-6, pp. 20 to 70), defendant subscribed for the stock in question in the following July. It is difficult to see how it can be said to be retrospective or how it impairs the obligation of the contract. Even if the defendant is to be placed upon the same basis in this respect as those who subscribed for stock in 1859, when the corporation was created, the result must be the same, for the statute creates no new or additional liability or burden. The stockholder's indebtedness is not, in the least, increased either to the corporation or to the creditor. The amount unpaid was at all times a part of the assets of the corporation and properly applicable to the payment of its debts. The most that can be said is that the statute creates a supplementary proceeding, available to the creditor against a single stockholder, whereas without it the creditor must resort to an original proceeding against the solvent stockholders of whom the court could acquire jurisdiction. By all this the stockholder may lose some advantages, such as delays, and the immediate distribution of the debt among other solvent stockholders, but these results are mere incidents to the change in the remedy and in which he has no vested right. It is competent for the legislature to thus change the remedy. *Tennessee v. Sneed*, 96 U. S. 69; *Terry v. Anderson*, 95 U. S. 628; *Springfield v. Commissioner*, 6 Pick. 508; *Ellis v. Jones*, 51 Mo. 181; *Porter v. Mariner*, 50 Mo. 364. This remedy here is distinct enough from the right and a critical examination of the authorities is not called for.

3. Under the ruling in *Eyerman v. Blakesley*, 78 Mo. 145, these are the only questions which can be considered in this court, as the amount involved is less than twenty-five hundred dollars. Affirmed. All the judges concur.

The Kansas City, Springfield & Memphis Ry. Co. v. Weaver.

THE KANSAS CITY, SPRINGFIELD & MEMPHIS RAILROAD
COMPANY V. WEAVER *et al.*, Appellants.

1. **Railroad: CONDEMNATION PROCEEDING: LIFE ESTATE.** The owner of a life estate in land condemned for a right of way for a railroad, is entitled to the same estate in the money paid into court under the condemnation proceedings.
2. ——— : ——— : ———. A judgment creditor of the remainderman in such life estate can assert no claim to any part of said money during the continuance of the life estate.

Appeal from Greene Circuit Court.—HON. W. F.
GEIGER, Judge.

AFFIRMED.

F. H. Sheppard for appellant.

(1) It was proper for the court below to determine the rights of the defendants among themselves. R. S., 1879, sec. 3673. (2) The deed to Mrs. Hooper in evidence creates a life estate in her, with a contingent remainder to those of her children surviving her. *Johnson v. Waters*, 17 Mo. 587; *Emison v. Whittlesey*, 55 Mo. 254. (3) The remainder in defendant, L. E. Hooper, is contingent on an event, to-wit, his mother's dying before him. The persons who are to take are in existence, and ready to take at any instant the estate becomes vacant. (4) A contingent remainder, depending on an event, and not on a person, is vendible on execution. Washburn on Real Prop. (4 Ed.) [*238] 562; R. S. Mo., 1879, secs. 668, 2354, 2356; 4 Kent's Com. (12 Ed.) [*261] foot [267]; *Reinders v. Koppelman*, 63 Mo. 482. (5) "The interest * * * whether it be regarded as a vested or contingent remainder, was liable to be subjected to the payment of his debts." *White v. McPheeters*, 75 Mo.

The Kansas City, Springfield & Memphis Ry. Co. v. Weaver.

286, and see, especially, foot of page 292. (6) It was proper to calculate the value of the life estate, and for the court to reserve the interest of the remainderman. *Lewey v. Lewey*, 34 Mo. 367; *Graves v. Cochran*, 68 Mo. 74.

Goode & Cravens for respondent.

HENRY, C. J.—The Kansas City, Springfield & Memphis railroad company commenced proceedings to condemn for a right of way a strip through a tract of land in Greene county, which had been conveyed to one Blakey in trust for the defendant, Harriet Hooper, to her sole and separate use for her life, with a provision in the deed that if she should die leaving a child or children of her body, in wedlock lawfully begotten, living, at her death, then the said trustee should convey the land to said child or children in fee-simple; but if she should die leaving no child, then he should convey the land to Spencer Hooper and his heirs. The condemnation proceedings resulted in a judgment establishing the right of way, and an award of two hundred and fifty dollars damages to the owners of the land, which was paid into court, and two hundred dollars of that amount have since been paid to Mrs. Hooper. Prior to the condemnation proceedings, Osburn & Company had obtained a judgment against the defendants, Spencer Hooper and his son, Ludolphus E. Hooper, and under an execution issued thereon had their interest in said land levied upon and sold, and purchased and received the sheriff's deed therefor, and in this condemnation proceeding Osburn & Company filed their petition, alleging the foregoing facts and asking that the present value of Mrs. Hooper's life interest in the said two hundred and fifty dollars might be ascertained, and for a judgment in their favor for one third of the amount remaining after deducting her life interest. Mrs. Hooper had three children living at the

Bent v. Priest.

time, and Osburn & Company claimed one-third as purchasers of L. E. Hooper's interest in the land.

The principal question discussed by counsel in their brief relates to the vendibility of a contingent remainder. But we decline to pass upon that question on the record before us, because, whether vendible or not, Osburn & Company have no right to the possession of any portion of the money in controversy until the death of Mrs. Hooper, if then. She has a life estate in the entire tract of land, and, consequently, in said money, which represents the strip condemned for a right of way. The entire proceeding was one at law, and the interest Osburn & Company asserted was a legal interest. And their equity, if they have any, to have the money so secured that at Mrs. Hooper's death they may receive their part, was not set up, even if it could have been, in this proceeding. The judgment of the circuit court was against them. The declarations of law given and refused were upon the questions discussed in the briefs. Whether the instruction given was correct or not, or whether that refused should have been given or not, for the reasons above stated, we will not determine.

The judgment was for the right party, and the instructions given and refused were on an immaterial question, so far as the case presented by this record is concerned. All concur. Judgment affirmed.

BENT, Receiver, Plaintiff in Error and Respondent,
v. PRIEST, Appellant and Defendant in Error.

1. **Agents and Trustees : PROFITS MADE IN BUSINESS OF PRINCIPAL.**
An agent or trustee cannot unite in himself the opposite character

Bent v. Priest.

of buyer and seller and if he does so, the profits made by him may be charged with a trust for the benefit of the principal, unless the latter confirm the transaction with full knowledge of all the facts. So, too, if the agent make gains from the use of the trust funds or property, he must account therefor and if the agent accept any benefits in conducting the business of his principal he will hold them in trust for the latter.

2. **Directors of Corporation:** AGENTS AND TRUSTEES. The directors of a corporation are trustees and agents of it and the stockholders, and, in general, are governed by the same rules as are applied to trustees and agents.
3. ———: ———. By accepting the office, a director of a corporation undertakes to give his judgment and influence to its interests in all matters in which he represents or professes to represent it.
4. ———: ———. The defendant, a director in a life insurance company, in consideration of certain railroad bonds delivered to his business partner, agreed to and did advocate and vote for the assignment of the company's policies to another company and for the reinsurance of the same in the latter company; *held*, that so many of the bonds as defendant received belonged to the corporation of which he was a director, and on his failure to produce the same a judgment for their estimated value was rightly entered.
5. ———: ———. There could be a recovery only for the bonds received by the defendant, and not for those retained by his business partner, the latter not being a party to the suit and having held no fiduciary relation with defendant's corporation.
6. **Statute of Limitations.** The statute of limitations commenced to run against the corporation only from the time it had knowledge of the agreement and acquisition of the bonds.
7. **Champerty.** Unless the plaintiff's title, by which he seeks to enforce a right, is infected with a champertous agreement, he may proceed with his suit, and this is the case although such illegal contract may exist between the plaintiff and his attorney. A party will not be turned out of court because of a champertous contract, until he asks the aid of the court to enforce it.

Appeals from St. Louis Court of Appeals.

AFFIRMED.

A. J. P. Garesche and J. M. Holmes for appellant,
Priest.

(1) The action, if it ever existed, was included in

Bent v. Priest.

the transfer to the Mound City Company. (2) The action is brought under a champertous agreement and plaintiff cannot recover. *Arden v. Patterson*, 5 John. Ch. 44; *Weekly v. Hall*, 13 Ohio, 175; *Webb v. Armstrong*, 5 Humph. 381; *Rives v. Weaver*, 36 Miss. 383; *Barber v. Barber*, 14 Wis. 143; *Greenman v. Cohie*, 61 Ind. 206; *Gilbert v. Holmes*, 64 Ill. 556; *Cardwell v. Sprigg*, 7 Dana (Ky.) 39; *Marks v. Jordan*, 3 B. Mon. 116; *Crowley v. Vaughan*, 11 Bush (Ky.) 517; *Coughlin v. N. Y. & H. Railroad*, 71 N. Y. 452; *Vincent v. Ashley*, 3 Head (Tenn.) 594; *Haynes v. Coyne*, 10 Tenn. 343; *Barnes v. Strong*, 1 Jones Eq. (N. C.) 100. Champerty is *malum in se*. 2 Bacon's Abridg't 186; Weeks on Att'ys, 166; *Brown v. Beauchamp*, 5 Mon. (Ky.) 416. And our statute adopts the common law. 1 Code, 521, secs. 3117-3118; *Duke v. Harper*, 66 Mo. 58. The abandonment of the bond since suit brought don't impair the defence. For the right to recover depends upon the facts when suit was brought, the *statu quo ante bellum*. *Norcom v. D'Oench*, 17 Mo. 115; *Weinrich v. Render*, 33 Mo. 83; *Hunt v. Thompson*, 51 Mo. 155; *Norfleet v. Russell*, 64 Mo. 178; *Wilson v. Garaghty*, 70 Mo. 519; *Dunlap v. French*, 76 Mo. 108; *Hermann v. Brewster*, 7 Bush (Ky.) 355. (3) This action is barred by the statute of limitations. *Wilmerding v. Russ*, 33 Conn. 67; *Smith v. Riccords*, 52 Mo. 581; s. c., 56 Mo. 553; *Rogers v. Brown*, 61 Mo. 187; *Wood v. Carpenter*, 101 U. S. 135; *Cole v. McGlattery*, 9 Me. 131; *Mudd v. Hamilton*, 8 Allen, 130; *Webster v. Newbold*, 41 Pa. St. 482; *Murray v. Coster*, 20 Johns. 576; *King v. Bloodgood*, 7 Johns. 114; *Hawley v. Cramer*, 4 Cowen, 717; *Robinson v. Hook*, 4 Mason, 151; *Clark v. Bowman*, 18 Wallace, 493; *Beckford v. Wada*, 17 Vesey, 87; *Gebhardt v. Sattler*, 40 Iowa, 157; *Haymond v. Kealy*, 3 Cranch C. C. 325; *Farnham v. Brook*, 9 Pick. 242-248; *Martin v. Bank*, 31 Ala. 113; 1 Bailey S. C. ch. 304. (4) The evidence don't establish a cause of

Bent v. Priest.

action. 10 House of Lords, 26; *Bank of London v. Tyrrel*, Story's Conf. Laws. (8 Ed.) sec. 249. (5) It is incumbent on defendant to make out the defence under the statute of limitations. He has the means of showing when Wyman received these bonds; or at any rate he ought to have such means. These particulars were and always have been concealed from us. If the point be left in obscurity the decision must be against him who fails to sustain his plea, though he possesses the means of so doing; or at any rate, the means of showing the facts, whether they sustain his plea or not. (6) But the matter was kept secret at the time; was not a matter of which the St. Louis Mutual Life Insurance Company had any notice or knowledge, and was only discovered by the representative of the St. Louis Mutual Life Insurance Company about a year before the hearing; in other words, contemporaneously with the institution of this suit. (7) The plaintiff brings himself within the saving clause of the statute (W. S., chap. 89, secs. 8, 10), and the defendant has wholly failed to prove, as it was incumbent on him to do, that more than five years had elapsed since the bonds were received by Wyman. (8) The question whether or not a champertous contract was made between the receiver and his counsel has no relevancy. The receiver does not rely to maintain his action on any instrument or oral contract tainted with a champertous agreement.

T. T. Gant and J. M. Glover for respondent, Bent.

(1) Whatever was received by Wyman was received by Priest. He turned Peck over to Wyman for conference and settlement and is answerable for whatever came into Wyman's hands in the same manner precisely as if he had received it in his own hands. *Shines v. Bank*, 70 Mo. 524. (2) The money or property thus coming to Wyman's or to Priest's hands was the consideration

paid for Priest's action in promoting the assignment and re-insurance spoken of. (3) The action of Priest, thus paid for, was what he did in his capacity as director; and whatever was thus paid to him for that action became the property of the company whose director he was. Perry on Trusts, secs. 206-7; *Gaskell v. Chambers*, 26 Beav. 360; Story's Eq. Jur., sec. 1564. (4) As to the defence of the statute of limitations, it cannot prevail. The "ratifications" were exchanged after the middle of January, 1874. The bonds were turned over at least as much as three or four weeks afterwards—(Peck says from four to six weeks)—and presumably much later. It is shown by the record that Wyman (who, besides being the partner, was the *alter ego* of Priest) chafed at the delay made by Peck. He wanted the money. He wanted the gas light bonds. He was disappointed in getting either. He finally, in despair of anything better, took these railroad bonds. If the interval between the exchange or ratification and the delivery to Wyman of the bonds was five weeks, this suit, which was begun on February 19, 1879, was within the five years.

BLACK, J.—In 1873, the superintendent of insurance began proceedings to wind up the St. Louis Mutual Insurance Company, which was not then in a satisfactory condition. Most of the directors regarded a reinsurance as the best way out of the difficulty. Efforts were made to that end, including negotiations with the Mound City Life Insurance Company. Charles H. Peck, who was a large stockholder in the St. Louis Mutual, but not a director or officer, made proposals to some of the officers of the Mound City to bring about such an arrangement, the result of which was a contract between Peck and the president of that company, dated the twenty-seventh of November, 1873, by which, after reciting the desire of that company to effect the reinsurance, and the deemed

• Bent v. Priest.

necessity of Peck's services to accomplish that object, the company agreed to pay him \$155,000 within sixty days, for which sum Peck was to "devote his services for the procurement of such reinsurance and effecting a contract between said companies."

Peck thereupon approached the defendant, a director of the St. Louis Mutual, who at first did not take much interest in the matter. Peck, then, in substance, stated that he was largely interested in having the reinsurance effected; that it was worth ten or fifteen thousand dollars to the stockholders of the St. Louis Mutual, and that he meant business.

Priest and Wyman were partners in the real estate business and upon Peck's suggestion that his business was legitimately within the partnership business, Priest referred Peck to Wyman, who was at a desk in the same room or office. The result of the negotiation between Peck and Wyman was that the former placed bonds of the Leavenworth, Atchison & Northwestern Railroad Company of the par value of fifteen thousand dollars in the hands of Mullikin to be handed to Wyman, if the reinsurance was effected, otherwise they were to be returned to Peck. This agreement was in writing, but was subsequently destroyed. The evidence, including a letter from Peck, shows that he agreed within thirty days to substitute money, or bonds of the Vulcan Iron Company, or St. Louis Gas Light Company, for these railroad bonds, the latter, it is said, then being worth but sixty cents on the dollar.

As the Mound City Insurance Company then stood, the superintendent of insurance did not regard it strong enough to make the reinsurance, and it was required to add a half million dollars to its capital stock. In December, 1873, a contract of reinsurance was made by the St. Louis Mutual with the Mound City, the latter also stipulating that for a transfer of all of the assets of the St. Louis Mutual it would assume all the liabilities of

Bent v. Priest.

that company, increase its own stock a half a million dollars, and out of this increased stock exchange its own stock for that of the St. Louis Mutual. Of the twenty directors of the St. Louis Mutual, seventeen, including the defendant, voted for the measure. The Mound City increased its stock as agreed, the reinsurance was approved by the superintendent of insurance and by the court in which the proceedings against the St. Louis Mutual were pending, and those proceedings were dismissed. By the seventeenth of January, 1874, the whole contract was substantially completed. Peck received his agreed compensation from the Mound City Insurance Company in secured notes which that company acquired by the assignment from the St. Louis Mutual. Peck would not, at least did not, substitute money or bonds of the Iron Company, or Gas Company, as he had agreed, for the railroad bonds in the hands of Mullikin, and Wyman, unable to do better, took those bonds. In August, 1874, Priest and Wyman dissolved their partnership, at which time Wyman handed over to Priest the one-half of the railroad bonds.

The conclusion from all the evidence is irresistible that defendant agreed to and did advocate and vote for the assignment and reinsurance, in consideration of the arrangement between Peck and Wyman. At all events the bonds were given to secure defendant's active influence in favor of the measure, though without this he might not have been hostile to the transaction.

In 1877 the superintendent of insurance commenced new proceedings against the St. Louis Mutual Life Insurance Company, and plaintiff was appointed receiver. By this suit he seeks to charge the defendant as a trustee of all the railroad bonds. The circuit court so held and decreed as to the one-half received by the defendant, and on his refusal to produce the same, entered a money judgment for the estimated value. From this

Bent v. Priest.

judgment the defendant appealed. Plaintiff took a writ of error. In like manner both parties come to this court from the court of appeals, where the judgment of the circuit court was affirmed.

1. An agent or trustee cannot unite in himself the opposite character of buyer and seller, and if he does the profits may be charged with a trust for the benefit of the principal, unless the latter confirm the transaction with full knowledge of all of the facts. So, too, if the agent make gains from the use of the trust funds or property he must account therefor. We need not cite authorities from this and other courts to support these plain propositions. Again, if the agent accept any benefits in conducting the business of his principal he will hold them in trust for the principal. Story on Agency, sec. 211 (8 Ed.); Perry on Trusts, sec. 206; *Jacobus v. Munn*, 37 N. J. Eq. 48.

The directors of a corporation occupy a fiduciary position. They are trustees and agents of the corporation and stockholders. In general they are governed by the same rules as are applied to trustees and agents. *Parker v. Nickerson*, 112 Mass. 195; *Ry. Co. v. Poor*, 59 Me. 277; *Ry. Co. v. Hudson*, 19 Eng. L. & Eq. 365. In Perry on Trusts, at section 207, it is said: "And so all advantages, all purchases, all sales, and all sums of money received by directors in dealing with the property of the corporation, are made and received by them as trustees of the corporation, and they must account for all such moneys or advantages, received by them by reason of their position as trustees." Defendant does not seriously controvert these general principles of equity jurisprudence, but he insists they have no rightful application to this case, because the bonds were never made a part of the assets of the St. Louis Mutual, did not constitute a part of the consideration, avowed or concealed, paid by the Mound City, and were not made by him in the legitimate business of the corporation. He relies with

Bent v. Priest.

full confidence upon *Tyrrell v. Bank of London*, 10 H. L. C. 26. The substantial facts of that case were these: The bank had been recently organized, and Tyrrell was its solicitor. Mrs. Campbell owned certain property, upon a part of which was situated a building known as the Hall of Commerce. Read had a contract with her for the purchase of the whole property at £49,200. Tyrrell and Read formed a combination to sell the property to the bank at an advanced price, and Tyrrell, for his influence, was to have a one-half interest in the contract, which Read had with Mrs. Campbell. Tyrrell kept the agreement secret from the bank, at the same time urged the bank to purchase, professing to act for it as solicitor. Eventually the bank purchased the Hall of Commerce part of the property at £65,000. Out of this Mrs. Campbell was paid, some litigated claims were settled, and the balance was paid to Read, who divided the profits with Tyrrell, each making some £6,000, and had left also the unsold portion of the property, alleged to be of the value of £8,000. The suit was brought by the bank against Tyrrell and Read. The master of the rolls dismissed the bill as to Read, and decreed Tyrrell a trustee for the bank of all interest acquired in the property, accounts were directed to be taken, and Tyrrell was ordered to convey to the bank his share in the property not sold to the bank. On appeal, prosecuted by Tyrrell, the decree was modified in form. The Lords considered that Tyrrell could not be decreed a trustee of the unsold portion of the property, and should not have been directed to convey that to the bank, because, as was said, the limit of the agency of Tyrrell, the extent of his obligation, and the relation of solicitor and client, were to be ascertained by the extent of the property sold by Tyrrell to the bank. The Lord Chancellor very clearly states that Tyrrell could only be a trustee as to that portion of the property sold to the bank, and as to that he should make no gain. He proceeds to say the object

Bent v. Priest.

which the master of the rolls has in view is to be accomplished in another way: "Tyrrell must receive from his clients, in his character of vendor to his clients, only that sum of money which, as between him and Read, Tyrrell must be taken to have paid for the property conveyed to his clients, but that sum of money must be ascertained in the following way: By deducting from it the value of the unsold property included in the contract between Read and Tyrrell, but not included in the contract of sale to the clients."

The bank among other things contended, that assuming Tyrrell's agency as to the bank was confined to the Hall of Commerce part of the property, still the circumstances showed that he received the share in the rest as a bribe, and for that reason the bank was entitled to a conveyance of it. As to this contention, Lord Chelmsford said: "No authority has been adduced in support of such a proposition, and I do not think it can be maintained. In order to simplify the question, let it be supposed that Tyrrell had acquired no interest in the property, but that Read had offered him £5,000 to induce the respondent to purchase, and that they had been persuaded by Tyrrell to buy at an excessive price. Of course, they might have rescinded the contract, but could they in any manner have obtained the £5,000 on the ground that it belonged to them? If, by reason of the agreement between Read and Tyrrell, the respondent had been prevailed upon to give too large a sum for the property, they might have maintained an action on the case against both the parties to the imposition upon them, and have recovered damages; or they might have sued their agent, Tyrrell, for damages arising from the breach of duty, and they would probably have received an amount equal to the sum which he had improperly received as a fair measure of the injury which they had sustained. But the £5,000 itself, as a specific demand, they could in no manner have recovered. The unsold

Bent v. Priest.

part of the property in the same manner cannot be directly reached by any proceeding of the respondent." These remarks of Lord Chelmsford, if detached from the facts of that case and the decree actually made, appear to give some support to the defendant's position here.

The solicitor could be regarded as the agent of the bank only so far as the bank became the purchaser; beyond that he had a right to deal for himself; yet the decree as modified did not allow him to make any gain out of the transaction taken as a whole. He was allowed to keep the unsold portion, but its value was deducted from the amount which he was allowed to receive from the clients in the statement of the account. Practically, there was little, if any, difference between the decree as made by the master of the rolls and as modified, in its effect upon the parties, and this seems to have been conceded in terms by Lord Cranworth. The facts there in judgment and the decree even as modified, do not furnish, a precedent in defendant's favor.

Where a trustee retired from his office in consideration that his successor paid him a sum of money, it was held that the money so paid should be treated as a part of the trust estate, and be accounted for as such by the retiring trustee, on the ground that he could make no profit directly or indirectly from the trust property, or from his office of trustee. *Sugden v. Crossland*, 3 Smale & Giff. 192. In *Gaskell v. Chambers*, 26 Beav. 360, it appears the Eagle Insurance Company desired to buy out the business of the London Mutual Insurance Company, and agreed to and did pay a specific consideration therefor, and, by a secret agreement with the directors, agreed to and did pay to them the further sum of four thousand pounds as a compensation for the loss of their officers. These directors were held to be trustees for the corporation, and it was also ruled that they received that sum by reason of their position as trustees and must account therefor.

Bent v. Priest.

These cases are all quite clear to the effect that the trustee will not be allowed to make gain to himself, beyond his allowed compensation, by reason of his office and influence as such trustee. By accepting the office the director undertakes to give his judgment and influence to the interests of the corporation in all matters in which he represents or professes to represent it. That judgment and influence, of right, belongs to the corporation, and so does that which it produces, and the bonds received by the director are its property, as between it and the defendant. The circumstance that they came from Peck, and not directly from the Mound City Insurance Company, is wholly immaterial. They came from the agent of that company, and the extravagant amount paid Peck impresses one with the notion that more than fair commissions was included in the \$155,000. However that may be, what the director makes in his office as such belongs to the corporation. It will not do to clog these principles of law applied to principal and agent, trustee and *cestui que trust*, with exceptions and modifications. They must not be whittled away. Whatever may be the practice in such cases, the agreement by which the bonds were acquired was an illegal contract, as well as a plain breach of duty. No court, it is true, would aid the defendant or the receiver, or the corporation of which he is the receiver, in recovering the bonds from Peck, for that would be to execute the illegal contract. Neither would a court assist Peck in recovering them back after the transaction was completed. So, too, an agent may resist an accounting on the ground that the subject of the agency was illegal, or against public policy. Story on Agency, sec. 235. But when the subject of the agency is entirely legal, and that was the case here, and profits are made by a violation of duty, it would be obviously unjust to allow the agent to reap the fruits of his own misconduct. *Id.*, sec. 207. An agent is accountable to his principal for moneys that came

Bent v. Priest.

into his hands as such, even if such amount be composed of usurious interest, and not collectible by the principal himself. *Chinn v. Chinn*, 22 La. Ann. 599. One party cannot hold back proceeds from another, of whom he was representative, on the ground that there was illegality in the way of getting the money. Whart. on Con., sec. 354. The defendant acquired the bonds while acting and professing to act in his capacity of director, and must be held to have received them in that capacity. The plaintiff's case is made out by the proof of these facts, and we are not concerned in the execution of the illegal agreement.

2. As to the writ of error prosecuted by the receiver we do not see that he has any right to the bonds which never came to the defendant. Wyman, who acquired them, is no party to this suit, and held no fiduciary relation to the plaintiff's corporation. The receiver has elected to take the course here pursued and must be content with such property as it will reach.

3. This suit was begun February 19, 1879, five years and ten to fifteen days after Wyman received the bonds for himself and defendant. The agreement by which the bonds were acquired and the receipt of the same are facts which were kept secret from all persons save those directly connected therewith, until 1878, when rumors were afloat pointing to these facts. They were then brought to the attention of the court and soon thereafter this suit was begun. Defendant pleaded the five year statute of limitations, and plaintiff replied that the fraud was not discovered until within five years next before the commencement of the suit. Section 3230, Revised Statutes, specifies five different classes of civil actions (other than those for the recovery of real estate) which can only be commenced within five years after the cause of action shall have accrued. The fifth is: "An action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued

Bent v. Priest.

until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud."

Our statute of limitations applies to equitable, as well as legal causes of action, and we agree with counsel for the defendant that this clause under consideration should be considered in the light of the former equity rules, the place of which, in many respects, at least, it was designed to take. Beyond doubt the statute does not now and never did run against an express continuing trust in favor of the trustee, certainly not until he openly repudiates the trust. *Johnson v. Smith*, 27 Mo. 591; *Smith v. Ricords*, 52 Mo. 581; s. c., 56 Mo. 553. Conceded it must be that by the equity rules, the statute was not applied by way of analogy, in cases of actual fraud, until the discovery of the fraud. But is it true, as is contended here, that by those rules the statute was applied without regard to the time of discovery in case of constructive frauds and trusts? It was said by Scott, J., in *Keeton's Heirs v. Keeton's Adm'r*, 20 Mo. 541: "In cases of resulting, implied and constructive trusts, where a party is to be constituted a trustee by a decree of a court of equity founded on fraud, it is well settled as a rule of equity, that the statute of limitations, and presumptions from lapse of time, will operate. With regard to the statute of limitations, it will run from the time that the facts are brought home to the knowledge of the party." See also *Perry on Trusts*, secs. 228 and 230; 1 *Dan. Ch. Plead.* 669; *Hunter v. Hunter*, 50 Mo. 445; *Angell on Lim.*, sec. 470. In the case last cited the defendants were the uncles and agents of the plaintiffs for the management and sale of the lands; they purchased the lands, with the value of which plaintiffs were not familiar, at an under value; they then sold the same at an advanced price. It was a suit to establish a constructive trust for the profits arising from the re-sale. It was there said: "If a party is in possession of, or has notice of, the main

Bent v. Priest.

facts constituting the fraud, the statute will commence running from that time." The difference of opinion expressed in that case and the subsequent one of *Rogers v. Brown*, 61 Mo. 187, is not pertinent to any inquiry here, for this case in no way concerns real estate.

Many authorities do hold that in cases of constructive trusts and frauds, the statute will begin to run without regard to the time of the discovery. This appears to be due to the fact that often in such cases the facts are open and the law frequently draws its conclusion without regard to the motives, because of the confidential relation of the parties. Much, we think, depends upon the fact whether the fraud is a secret or open one. If the substantial facts constituting the fraud, in cases like the one under consideration, were open, it is believed, under the equity rules, the statute of limitations would have been applied at once, but if these facts were in their nature secret and were unknown, it is believed the statute would not begin to run until they were discovered, there being no want of diligence on the part of the complainant. Here the fraud consists in professing to act for and in the interest of the corporation, as was defendant's duty, when, in reality, he was acting for himself and for his private gain. The agreement under which this was done was in its very nature a secret one, one which the corporation would not naturally suspect, and one which would not be revealed by any act openly done. Of course, here, simple knowledge of the existence of the agreement and acquisition of the bonds thereunder, brought home to the plaintiff, or the corporation of which he is receiver, would start the statute and from that time it would continue to run notwithstanding the subsequent appointment of the receiver. This knowledge was not acquired until much more than fifteen days after the receipt of the bonds, by Wyman. The circumstances by which the transaction was discovered show there were no *laches* on the part of

Bent v. Priest.

the plaintiff or his corporation. We conclude the clause of the statute before noted applies to this case, and under it the cause of action is not barred.

4. A contract founded on a champertous consideration is illegal, against public policy and void. *Duke v. Harper*, 66 Mo. 55. In that case the contract there in question was held not to be champertous because the attorneys did not bind themselves to pay any portion of the expenses of the litigation. Where the right of the plaintiff, which he seeks to enforce, is derived under a title founded on his champerty, the suit must fail. Courts are not organized for the purpose of enforcing such contracts. Many of the authorities cited by defendant go to this extent and no farther. Some of them do appear to hold that where there is a champertous contract, by which the suit is prosecuted, and that fact comes to the knowledge of the court, it should dismiss the suit. *Barker v. Barker*, 14 Wis. 143; *Webb v. Armstrong*, 5 Humph. 379. Others appear to give a qualified approval to the doctrine. On the other hand a number of cases hold that the fact that the suit is being prosecuted under a champertous contract is no defence, and that the illegality of such a contract can only be set up when it is sought to enforce the contract. *Hilton v. Woods*, 4 L. R. Eq. Cas. 432; *Whitney v. Kirtland*, 27 N. J. Eq. 333; *Allison v. Ry. Co.*, 42 Iowa, 274; *Court-right v. Burnes*, 3 McCrary 60. Unless the plaintiff's title, by which he seeks to enforce a right, is infected by a champertous contract, we see no reason why the suit may not proceed, though such a contract exists as between the plaintiff and his attorney. It is time enough to turn a party out of court when he asks the aid of a court to enforce such a contract. This is, in substance, the rule as to most illegal contracts, and there is no good reason at this day for making an exception in this class of contracts.

Certain policy holders brought to light the facts

Bent v. Priest.

upon which this suit is founded, and were permitted by the court to prosecute the same in the name of the receiver upon indemnifying him, and, as a consequence, the funds in his hands, against the payment of costs. These policy holders were but protecting their own rights. They could not well sue in their own names. In such cases it is not an uncommon thing for cautious courts to require that the officer be made safe against costs of long and tedious suits. Thus far there is no element of champerty in the defence. It would seem the defendant offered to prove that the attorney by whom the suit was instituted and who represented these policy holders, gave the bond, and, further, that he had an agreement with the receiver by which he was to have a certain portion of the avails of the suit for his services. In view of this offer let it be conceded, for the purposes of this case, without deciding the question that the agreement between the attorney and the receiver was champertous, still, applying the principle before announced, that constituted no defence to this action. The receiver's accounts will come before the court for its approval and it will be time enough then to examine into the question of the validity of the agreement. The plaintiff is in no wise affected by the illegal agreement, even if any there was. We do not think public policy requires the courts to turn aside and investigate such side issues.

The judgment in this case, from which both parties come to this court, is affirmed. Henry, C. J., dissents. The other judges concur.

Backenstoe v. The Wabash, St. Louis & Pacific Ry. Co.

BACKENSTOE V. THE WABASH, ST. LOUIS & PACIFIC
RAILWAY COMPANY, *Appellant.*

1. **Railroad: KILLING STOCK: JURISDICTION: JUSTICE OF PEACE.** In an action brought before a justice of the peace against a railroad for double damages for killing stock, the fact that the killing occurred in the township where the suit was brought, or in an adjoining township, is a jurisdictional one. It is not sufficient that such jurisdictional fact be averred in the statement; it must also be shown by the evidence.
2. ———: ———: ———. Proof simply that the killing occurred within the corporate limits of a town is not sufficient to warrant the jury in finding that it occurred in the township charged in the statement.

Appeal from Kansas City Court of Appeals.

AFFIRMED.

G. S. Grover and W. H. Blodgett for appellant.

While it was averred in the statement that the animal was killed in Egypt township, Carroll county, Missouri, such fact was not proved. In the absence of such proof, no venue was shown and no jurisdiction was acquired by the court. *State v. Metzger*, 26 Mo. 65; *Hansberger v. Railroad*, 43 Mo. 196; *Iba v. Railroad*, 45 Mo. 469; *Haggard v. Railroad*, 63 Mo. 302; *Barnett v. Railroad*, 68 Mo. 56.

Hale & Sons for respondent.

The statement avers that the killing was done in the township where the suit was brought, and this was sufficient to give the court jurisdiction. *Barnett v. Railroad*, 68 Mo. 50. The proof was that the killing was done in the town of Norborne, within the switch limits.

Backenstoe v. The Wabash, St. Louis & Pacific Ry. Co.

It will be assumed after verdict that it was done in the township.

HENRY, C. J.—This suit was commenced before a justice of the peace in Egypt township, Carroll county, to recover double damages for the killing of plaintiff's horse by a train of cars. Plaintiff had a judgment by default, from which defendant appealed to the circuit court, where plaintiff was again successful, and defendant appealed to the Kansas City court of appeals, which reversed the judgment and remanded the cause; but, Judge Hall not concurring, the cause has, under the provisions of the constitutional amendment, by which that court was created, been certified to this court.

There was no evidence tending to prove that the horse was killed in Egypt township, unless the proof that it occurred within the corporate limits of the town of Norborne, in said county, warranted the jury in inferring and finding that it occurred in Egypt township. As was observed by Judge Philips, who delivered the opinion of the court of appeals: "These township lines are made and unmade at the discretion of the county courts. The courts would not take judicial cognizance that Norborne was in Egypt township. How, then, could a jury infer it? If the horse was not killed in Egypt township, the justice had no jurisdiction of the cause."

Section 2835, Revised Statutes, gives a justice of the peace jurisdiction "of all actions against any railroad company in this state, to recover damages for the killing or injuring horses, mules, cattle or other animals, within their respective townships." And section 2839 provides that such actions "shall be brought before a justice of the peace of the township in which the injury happened, or any adjoining township." Justices' courts are courts of limited and inferior jurisdiction, and in the face of these provisions it cannot, with any degree of plausibility, be contended that the fact that the animal was killed

Backenstoe v. The Wabash, St. Louis & Pacific Ry. Co.

in the township where the suit was brought is not a jurisdictional fact, or that the party suing can confer jurisdiction upon the justice of the peace by simply asserting in his statement that the animal was killed in the justice's township. If this were sufficient, then a party complaining could sue before a justice of the peace in St. Louis county for the killing or injuring of stock by the St. Louis, Wabash & Pacific Railroad Company in Jackson county. That there are cases to be found in our reports, countenancing the view contended for by respondent's counsel, is true; but the recent decisions of this court are to the contrary.

In *Nall v. Railroad*, 59 Mo. 112, the following language occurs: "The petition alleged that it took place in Gallatin township. This gave the justice of the peace jurisdiction of the case, and the evidence showed at what point it happened. The question was for the triers of the fact, and we will not interfere." That opinion contains no statement of the evidence, but we have taken the pains to examine the transcript, and find that there was no evidence, whatever, showing in what township the killing occurred, and while on this point the opinion is somewhat obscure, we infer that the judgment was affirmed on the ground that the statement in the petition, that it occurred in Gallatin township, gave the justice jurisdiction. If it is to be so construed, we are of the opinion that it has no support, either in the sections of the statute above quoted or the numerous adjudications in this and other states on analogous questions. *State v. Metzger*, 26 Mo. 65; *People v. Miller*, 14 Johnson, 370. In the latter case it was said by the court that: "It is essential that it should appear that the court had jurisdiction of the offence, and it had no jurisdiction, unless it was committed in the county of Otsego." *Gibson v. Vaughan, Adm'r*, 61 Mo. 419; *Bersch v. Schneider*, 27 Mo. 101. The recent decisions of this court on this precise question, fully sustain the views expressed by the

The St. Louis Gas Light Co. v. The City of St. Louis.

Kansas City court of appeals, in the opinion delivered by Philips, J. *Mitchell v. Mo. Pac. Ry. Co.*, 82 Mo. 106.

The judgment of the court of appeals is affirmed.
All concur.

THE ST. LOUIS GAS LIGHT COMPANY V. THE CITY OF ST.
LOUIS, *Appellant*.

1. **Code Pleading:** DIFFERENT CAUSES OF ACTION, JOINDER OF. Under the code, each cause of action must be separately stated with the relief sought, yet the same cause of action may be stated in different ways in different counts.
2. ———. Where allegations are once clearly made which are common to all the counts, it is sufficient as to such allegations to make reference to them in the subsequent counts.
3. **Contract: STATUTE.** The Laclede Gas Light Company had the power, under its charter, to contract with the city of St. Louis to light the city within certain defined limits, to make and vend gas and gas light, and to lay down pipes therein, and to exercise all other powers necessary to execute and carry out the privileges and powers so granted, and these powers were not withdrawn from the company by the act of March 26, 1868 (Acts, p. —), but were, by said act, extended over the corporate limits of the city.
4. **Evidence.** In an action by the gas company to recover from the city the contract price for gas supplied to the public lamps, and for services rendered in lighting lamps, the record kept by the city engineer, and the register kept by the gas inspector, are competent evidence.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Leverett Bell for appellant.

- (1) The objection to the second and the remaining

The St. Louis Gas Light Co. v. The City of St. Louis.

counts in the petition was well taken. Not one of said counts states a cause of action against the city of St. Louis in favor of the St. Louis Gas Light Company. Take the second count as an illustration. Its subject matter is the service rendered by the plaintiff to the defendant in repairing, lighting, cleaning, and extinguishing certain public lamps in December, 1875. The public lamps in question, the district occupied by them, the contract between plaintiff and defendant governing said repairing, etc., are not, nor are any of them, specified in said count, and yet they constitute the *gravamen* of the charge. The rule at common law and under our system of pleading, is that each count in the petition must state a good cause of action within itself, and defective allegations in one count cannot be aided by reference to another count. Bliss on Code Pleading, sec. 121; *Leabe v. Deitrick*, 18 Ind. 414; *Day v. Vallett*, 25 Ind. 42; *Mason v. Weston*, 29 Ind. 561; *Clark v. Featherston*, 32 Ind. 142; *Silvers v. Junction Ry. Co.*, 43 Ind. 435, 445; *Durkee v. City Bank*, 13 Wis. 216, 222; *Curtis v. Moore*, 15 Wis. 134; *Catlin v. Pedrick*, 17 Wis. 88; *Sabin v. Austin*, 19 Wis. 421; *Nelson v. Swan*, 13 Johns. 483; *Sinclair v. Fitch*, 3 E. D. Smith, 677. (2) The court erred in refusing to instruct the jury that there could be no recovery in this case. (3) The court erred in permitting the bills sued on to be read in evidence to the jury. (4) The court erred in admitting the record kept in the street department of the location and number of street lamps. (5) The court erred in submitting the proof furnished by the witnesses Chauvenet and Caldwell, as to amounts due for the months of February, March, and April, 1876.

Glover & Shepley and *Noble & Orrick* for respondent.

(1) The separate statements are complete in themselves, averring facts, and a promise based on the facts. Either one is sufficient in itself to sustain the verdict ren-

The St. Louis Gas Light Co. v. The City of St. Louis.

dered on it. Each one, moreover, refers expressly to the complete contract set forth in the introduction to the whole petition. (a) The rule laid down in *Clark v. Whittaker Iron Co.*, 9 Mo. App. 446, is obeyed in all particulars. *Boeckler v. Mo. Pac. Ry. Co.*, 10 Mo. App. 448. Under such objection, which was made at the trial for the first time, "if a cause of action can fairly be gleaned from the petition, it ought to be held sufficient." *Clark v. Whittaker Iron Co.*, 9 Mo. App. 446. (2) The tripartite agreement of 1873 is valid; it has been so adjudged between the parties. *St. Louis v. St. L. Gas Light Co.*, 70 Mo. 69. (3) The record of city lamps kept in the city engineer's office, was a regular public record, and was competent and relevant. Greenleaf on Evidence (13 Ed.) secs. 483, 484, 485. (4) The register of the city gas inspector was official, and competent evidence against the defendant. (a) City ordinance, number 8434, approved July 11, 1873. (b) Chauvenet's testimony that he continued examination of plaintiff's gas bills up to the last, and kept the record even after disputes arose, by direction of the mayor. (c) Greenleaf on Ev. (13 Ed.) sec. 496; *Denning v. Roome*, 6 Wend. 651; *Gearhart v. Dixon*, 1 Pa. St. 224; *Adams v. Mack*, 3 N. H. 493; *Mayor v. Wright*, 2 Port. 230; Angell & Ames on Corp. (8 Ed.) sec. 679; *Engl. Manf. Co. v. Van Dyck*, 1 Stock. 498; *Hedrick v. Hughes*, 15 Wallace, 123. (5) The defendant did not attempt to show the gas was not burned or the lamps cleaned and repaired, as charged, and the case having been fairly tried on the pleadings and evidence, judgment should be affirmed, as the verdict was for the right party. Thompson Charging the Jury, sec. 118; R. S. 1879, sec. 3775.

BLACK, J.—This suit is based upon a contract made by the plaintiff, the Laclede Gas Light Company, and the defendant, dated February 28, 1873. The plaintiff
VOL. 86—32

The St. Louis Gas Light Co. v. The City of St. Louis.

seeks to recover for gas supplied to the public lamps in that district of the city which, under the terms of the contract, it agreed to light at thirty dollars per annum for each lamp, and for repairing, cleaning, lighting, and extinguishing the lights, at the rate of seven dollars per annum for each lamp. Payments were to be made monthly, and this suit is for gas furnished, and for such services, for the months of December, 1875, to and including May, 1876.

1. The petition consists of various counts, two for each month—one for the price of the gas, and one for the other services. The first count sets out the incorporation of the three parties to the contract, the ordinance directing the contract to be made, the contract and the terms thereof. These matters are not stated in the second and subsequent counts, but in them reference is made to the first by the use of such terms as “in the district aforesaid,” “under said contract,” and “agreed as aforesaid.”

The answer was a general denial. The sufficiency of the second and subsequent counts was questioned by way of an objection to the introduction of any evidence, on the ground that these counts did not state a cause of action. By following out the references thus made by the second and following counts to the first, each stated a good cause of action. This being so, the objection made, as it was for the first time, on trial, was properly overruled, even if well taken, had it been made in proper time. Aside from this, the point was not well taken. Formerly subsequent counts might be made certain by reference to a preceding one; nor was this rule always strictly confined to matters of inducement. 1 Chitty's Plead. 355; *Crookshank v. Gray*, 20 John. 347; *Freeland v. McCullough*, 1 Der. 414; *Griswold et al. v. Ins. Co.*, 3 Cow. 96; *Loomis v. Swick*, 3 Wend. 205. The count to which reference is made should be a good one. *Nelson v. Swan*, 13 John. 484. This last rule, it is said,

The St. Louis Gas Light Co. v. The City of St. Louis.

has no application to mere matters of inducement. *Curtis v. Moore*, 15 Wis. 134. We have held where the petition in the first count sets forth in the introduction the incorporation and corporate powers of the plaintiff and defendant it was not necessary to re-state such matters. *Aull Savings Bank v. City of Lexington*, 74 Mo. 104. Under the code each cause of action must be separately stated with the relief sought, so as to be intelligently distinguished. Yet the same cause of action may be stated in different ways in different counts. *Brinkman v. Hunter*, 73 Mo. 172. So, too, the petition must be a plain and concise statement of the facts constituting the cause of action without unnecessary repetitions. The code was not designed to require or encourage useless prolixity. Where, therefore, as in this case, allegations are once clearly made which are common to all the counts, it is sufficient to make reference thereto in subsequent counts. *Beckwith v. Mollahan*, 2 West Va. 481.

2. Further defence is that the contract sued upon must bind all of the parties or none, and that the Laclede Gas Company had no power to make the contract in question, and hence it is void as between the city and plaintiff. It is assumed, not decided, that the first branch of the proposition is correct, but the second is not true in point of fact or law. The sixth section of the act of March 2, 1857, incorporating the Laclede Gas Company, gave to it and the city power to make any contracts they deemed best, with regard to lighting a portion of the city, and to the city the right to purchase the property of the company at the expiration of twenty years. This section, it is true, was repealed by the act of March 26, 1868, and hence the conclusion contended for is drawn. But, by the fifth section of the act of 1857, that company had power within a defined district to light the same, to make and vend gas and gas light, and to lay down pipes therein, and all "other powers necessary to execute and carry out the privileges and powers" thereby

The St. Louis Gas Light Co. v. The City of St. Louis.

granted. All of these rights, privileges and franchises are, by the same act of March 26, 1868, extended over the corporate limits of the city. This legislation shows no intention to take away from the Laclede Gas Company its powers to contract with the city, but, on the contrary, its powers in this respect are extended over the entire city limits. The power to make and vend gas, lay down pipes, and light the city, would carry the power to make all necessary contracts with respect thereto, but express power is given to do all those things necessary to execute and carry out the privileges granted, and this must be held to include the power to make all needful contracts with the city. The validity of this contract was affirmed in a suit between these parties (70 Mo. 69), and the conclusion here stated is but a corollary of what was then said. It is true, the precise point now urged was not then ruled, but it was only because the exigencies of that case did not require it.

3. By the ordinance read in evidence it was made the duty of the engineer, by whom the lamps were erected, to report to the gas inspector the location of the lamps as soon as they were reported ready for lighting by the gas companies, and of the gas inspector to examine and certify as to the correctness of the bills of the gas companies against the city. Both were important public offices of the municipality, and both kept records of these matters. The records of lamps kept in the city engineer's office, and the register kept by the gas inspector, were competent evidence. Greenleaf on Evidence (13 Ed.) secs. 483, 484, 496. Defendant did not attempt to show that the services sued for were not rendered, nor that the bills were incorrect or had been paid. The judgment is clearly right, and it is affirmed. Sherwood, J., did not sit in the consideration of this cause. The other judges concur.

Crumb v. Hambleton.

CRUMB V. HAMBLETON, *Appellant*.

Construction of Statute : HOMESTEAD : TENANTS IN COMMON. Under section 2291, Revised Statutes of United States, where both father and mother die before perfecting an entry of a homestead, and receiving a patent therefor, their heirs are entitled to a patent upon making proof of the facts required by said section, and take as tenants in common.

Appeal from Stoddard Circuit Court.—HON. R. P. OWEN, Judge.

REVERSED.

D. H. McIntyre for appellant.

(1) If plaintiff has any interest at all in the land, it is the interest of Peter M. Spence, derived through the patent, which was an undivided one-third. R. S., U. S., sec. 2291. Hence plaintiff and defendant were tenants in common. 4 Kent's Com., side pp. 366, 367. To maintain this action plaintiff was compelled to show, on the trial, actual ouster, or that the defendant did some act amounting to a total denial of his right as such co-tenant. R. S., sec. 2248. This he failed to do. "When one joint tenant, parcener, or tenant in common, is in possession, his fellow is, in contemplation of common law, in possession also, and it would be necessary, in order to enable his companion to maintain ejectment, to rebut this presumption by proof of actual ouster." Tyler on Ejectment, 199. (2) If plaintiff was entitled to any interest in the land, it was only a part interest, and having obtained judgment for the whole it must be reversed.

J. C. Fisher for respondent.

(1) The fee to this land inured to Peter M. Spence,

Crumb v. Hambleton.

he being the only child under twenty-one years of age at the death of the parents. R. S., U. S., sec. 2292. (2) The fact that the patent was issued to the "heirs," instead of Peter M. Spence, is immaterial, because the language of the statute is "heirs," and the question of how many are under the age of twenty-one years, is a matter that must be determined by oral proof, the same as the question of the number of heirs left by a testator would have to be determined, were that question put in issue. 42 Mo. 327, and cases cited; 13 Johns. 518. The fact that Anna E. Spence applied for the patent for her own benefit, is also immaterial, as she was not entitled to it under the statute, and it was not issued to her, but to the heirs. (3) The position that the heirs are tenants in common cannot be maintained, because this is an estate created by the statute, and the heirs can take only such an estate as is given by it. (4) It is a well settled principle that a patent is the best title known to the law, and that it gives legal seizin and constructive possession, and is conclusive at law, and in ejectment. 5 Peters, 485; 13 Peters, 436; 13 Wall. 92.

NORTON, J.—This is a suit by ejectment to recover the east half of the southeast quarter, section thirty-five, township twenty-six, range ten. Plaintiff obtained judgment, from which defendant has appealed.

The land in dispute was occupied by John J. Spence, under the act of congress "to secure homesteads to actual settlers on the public domain," till his death, which occurred on the thirteenth day of February, 1871. Spence died before the end of the five years, when proof could be made for the certificate and patent, leaving as his heirs, Mary E. Vaughan, Annie E. Spence, and Peter M. Spence. The latter moved off this land in the fall of 1871, and never occupied it after that time. Annie E. Spence made the proof and obtained the certificate of entry, upon which a patent issued to the heirs

Crumb v. Hambleton.

of John J. Spence, dated January 10, 1874; on the twenty-first day of January, 1878, Peter M. and wife, conveyed all their interest in the land in question to this plaintiff; on the sixteenth day of February, 1878, said Annie E. Spence conveyed to this defendant, and he at once entered into possession. This suit was commenced in January, 1881. Plaintiff's claim rested alone on his deed from Peter M. and wife, and the defendant's upon the deed from Annie E., upon his occupation, and acts of Peter M., acknowledging defendant's title. The cause was tried without a jury; there were no declarations of law; judgment was for plaintiff for the land described in the petition.

The patent read in evidence vested the legal title to the land in dispute, "in the heirs of John J. Spence." The evidence shows that there were three of them, namely, Annie E. and Peter M. Spence, and Mary E. Vaughan, and it further shows that Peter M., at the time of his father's death, lacked about six months of being twenty-one years old, and that the two daughters were over that age. Under this state of facts the three children were tenants in common, each owning an equal undivided interest of one-third of the land, unless it be true (as plaintiff contends it is), that the act of congress gives, on the death of the father and mother, the entire homestead interest in the land to Peter M., who was a minor at the time of his father's death. Whether this is so or not, depends on a construction of sections 2291 and 2292, of the Revised Statutes of the United States, which are as follows:

"Section 2291. No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if, at the expiration of such time, or at any time within two years thereafter, the person making such entry; or, if he be dead, his widow; or, in case of her death, his heirs or devisees, * * * proves by two credible witnesses

Crumb v. Hambleton.

that he, she, or they, have resided upon, or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, * * * then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law."

"Section 2292. In case of the death of both father and mother, leaving an infant child, or children, under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children; and the executor, administrator, or guardian, may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the state in which such children, for the time being, have their domicile, sell the land for the benefit of such infants, but for no other purpose, and the purchaser shall acquire the absolute title by purchase, and be entitled to a patent from the United States on the payment of the office fees, and the sum of money above specified."

It is insisted by counsel for plaintiff that under said section 2292, when the father and mother both die, the fee in the land inures to a minor child, if there be one, to the exclusion of other children who have attained their majority, and that, although the patent in this case conveys the land to the heirs of J. J. Spence, the effect of it is to vest the fee in Peter M. Spence, who was the only child under twenty-one years of age at the time of the death of the father and mother. This construction would be in conflict with section 2291, which provides, in event of the father and mother both dying before perfecting the entry and issuance of the patent, that the heirs or devisees shall be entitled to a patent upon making proof of the facts stated in the section. The two sections should be so construed as to make them harmonious if possible. Section 2292 was doubtless intended to provide for a class of cases, when both father and mother die, before perfecting the home-

Cox v. Volkert.

stead right, leaving a minor child or children, or of years so tender as to incapacitate them from occupying the premises, and perfecting the entry, and that in all such cases the title should inure to the minor child, or children, and be sold by the executor, or administrator, for their benefit, giving to the purchaser at such sale, a right to a patent from the United States.

We do not think the section was intended to apply when both father and mother died, leaving children, some of whom were of age and some not of age. Such a construction of it as is contended for would nullify the provisions of section 2291, and lead to unjust results, an example of which is to be found in this case. Under it, Peter M., who lacked six months of being twenty-one years old, when his father died, and who moved off the premises soon after his father's death, would get the entire title, while Annie E., his sister, who remained on the premises till the entry could be perfected, and, in fact, perfected it, and procured the certificate of entry on which the patent issued, would get nothing. We must, therefore, hold that under the patent, Peter M. was a tenant in common with the other two heirs, and that his conveyance to plaintiff only passed to him an equal undivided interest of one-third of the land, and that, inasmuch as he recovered judgment for all of it, the judgment must be reversed and cause remanded, which is done. All concur.

Cox, Receiver, v. VOLKERT, Appellant.

1. **Partnership** : RECEIVER, POWER OF COURT TO APPOINT : JURISDICTION. The circuit court has original jurisdiction in all matters of

Cox v. Volkert.

equity, and has inherent power, independent of any statute authorizing it, to appoint a receiver in the settlement of partnership affairs, where there is no statute depriving it of such power.

2. **Receiver, Appointment and Authority of.** Where the order appointing a receiver gives him "full power to collect the rents, take care of and preserve the same," he is authorized thereby to collect the rents to become due after the appointment as well as those due at the date of the appointment.
3. **Receiver, Authority of to Sue.** Where a receiver brings suit in the court by which he was appointed, and prosecutes the same with its sanction, it is not necessary to produce an express order so to do.
4. **Pleading, Effect of.** The fact that defendant may plead the legal effect of an instrument differently from the plaintiff, does not deny its execution.
5. **Receiver, Effect of Appointment: LESSOR AND LESSEE.** The appointment of a receiver does not affect the rights of parties to a lease executed by those for whom he acts, and whatever defences, counter-claims, or set-offs, the lessee would have had in a suit by the lessors are available to the lessee, in a suit by the receiver, and the lessee may plead any failure of the lessors to perform their part of the contract.
6. **Contract: CONSTRUCTION OF LEASE.** Where, by the terms of a lease, the lessors agree to put in certain new machinery when needed, the necessity for the same to be decided by referees, in case the parties cannot agree, and the lessors refuse to join in selecting referees, the lessee may put in suitable machinery and charge the cost thereof to the lessors, and the latter cannot take advantage of their wrongful act in failing to join in the selection of referees. But the lessee will not be entitled to rental for the new machinery provided by him, nor to an allowance for losses incurred by him by reason of being unable to conduct his business while putting in the new machinery.

Appeal from Cole Circuit Court.—HON. E. L. EDWARDS,
Judge.

REVERSED.

Smith & Krauthoff for appellant.

- (1) The plaintiff had no right to maintain this suit.

Cox v. Volkert.

(a) There was no authority to appoint a receiver in the case of *Huegel v. Wallendorf*. General powers in this respect in equity are limited by the statute. High on Receivers, sec. 23; *Fellows v. Heermans*, 1 Abb. Pr. (N. S.) 1; *Newman v. Hammond*, 46 Ind. 119. Cox was not appointed for the purposes named in sections 3660 and 3661, Revised Statutes. *Gill v. Balis*, 72 Mo. 424.

(b) If the order appointing Cox receiver is not void, yet it did not and could not confer upon him the power to maintain this action. He is not the real party in interest, nor an executor or administrator, nor the trustee of an express trust. R. S., secs. 3462, 3463; *State ex rel. v. Gambs*, 68 Mo. 289. The receiver only had authority to sue for debts existing at the time of the appointment. *State ex rel. v. Gambs*, 68 Mo. 289; *Hannah v. Bank*, 67 Mo. 678. The receiver's right to sue must be founded in the statute, if at all. The order of the court appointing him could not enlarge his power beyond that which the law gave him, nor could the consent of parties. *Hannah v. Bank*, *supra*; *Freeman v. Winchester*, 18 Miss. 677. Unless authorized by statute a receiver cannot sue; he had no power to sue under the equity practice. *State ex rel. v. Gambs*, 68 Mo. 296, separate opinion of Judge Henry and cases cited; *Justice v. Kirlin*, 17 Ind. 588; *Manlove v. Burger*, 38 Ind. 22; *Freeman v. Winchester*, 18 Miss. 577; *Battle v. Davis*, 66 N. C. 252; *Screven v. Clark*, 48 Ga. 41. (c) The right of the plaintiff to sue was an issuable fact. The authority claimed was required to be duly alleged, and having been denied it devolved upon plaintiff to show it. High on Receivers, secs. 208, 231; *White v. Joy*, 3 Kern. 83; *Bangs v. McIntosh*, 23 Barb. 591; *Cope v. Bowles*, 42 Barb. 87; *Screven v. Clark*, 48 Ga. 41. This point does not stand waived. A plaintiff must allege a cause of action in his favor. 13 Mo. 532; 39 Mo. 373; 65 Mo. 105; 35 Mo. 373. And, unless he does so, the petition states no cause of action, and the objection

Cox v. Volkert.

can be made at any time. 38 Mo. 489; 52 Mo. 333; 53 Mo. 141; 65 Mo. 105 and 528; 67 Mo. 289; 21 Wis. 678; 28 N. Y. 242; 39 Ind. 165. The motion to strike out parts of the answer was practically a demurrer. 54 Mo. 400; 63 Mo. 19; R. S., sec. 3524. It went back to the petition and raised the question of its sufficiency. 57 Mo. 184; 10 Peters, 257; 14 B. Mon. 544; 39 Wis. 345; 51 Me. 414. This objection is not one of "legal capacity to sue," but that the plaintiff has no cause of action, nor any interest in the matter sued. 35 Mo. 373; 65 Mo. 105; 32 N. Y. 397; *Catholic Church v. Tobbein*, 82 Mo. 418. (2) The court erred in striking out the portions of defendant's answer in brackets. In actions by receivers "no right of defence shall be impaired." R. S., sec. 428. The rights of the parties are not changed by his appointment. High on Receivers, secs. 204, 205. *Coope v. Bowles*, 42 Barb. 87; *Williams v. Babcock*, 25 Barb. 109. The same defences can be made, and with like effect as against the parties themselves. *Bank v. Peck*, 29 Conn. 384; *Bell v. Shibley*, 33 Barb. 610. The defendant is entitled to the same off-sets and counter-claims. High on Receivers, secs. 247, 248; *Colt v. Brown*, 12 Gray, 233; *Berry v. Brett*, 6 Bosw. 627; *Van Wagoner v. Gas Light Co.*, 3 Zab. 283; *Curtis v. Leavitt*, 15 N. Y. 9, 42, *et seq.* (3) Defendant's answer is not "inconsistent pleading," such as is condemned by law. *Nelson v. Brodhack*, 44 Mo. 596; *McAdow v. Ross*, 53 Mo. 199; *Rhine v. Montgomery*, 50 Mo. 566; *Bell v. Brown*, 22 Cal. 671, 676, *et seq.*

A. M. Hough and Edwards & Davison for respondent.

There being no instructions preserved in the bill of exceptions, there is no question of law presented or saved in a manner which this court can review, and it will not undertake to weigh the evidence, to determine

Cox v. Volkert.

whether it justified the finding of the trial court. *Easley v. Elliott*, 43 Mo. 289; *Wilson v. Railroad*, 46 Mo. 36; *Wielandy v. Lemuel*, 47 Mo. 322. Courts of equity have power to appoint receivers to take charge of partnership affairs. Whether the court had the power or not to appoint a receiver in this case, it undoubtedly had jurisdiction of the subject-matter and parties, and by consent could appoint some one to take charge of the estate, and collect the debts, etc., and this was all that was done in this case, and this appellant, who was a party to the proceeding, consented to the plaintiff's taking charge of, and collecting the rent, and whom he repeatedly recognized as receiver, and cannot now, at this late day, be heard to complain. The order appointing Cox receiver, is a judgment of the court, entered by the consent of all the parties to the suit, including this appellant, and that judgment cannot be attacked in this proceeding. It is well settled in this state that a judgment, regular on its face, cannot be attacked collaterally. *Herndon v. Hawkins*, 65 Mo. 265; *Holt County v. Harmon*, 59 Mo. 165; *Bailey v. McGinnis*, 57 Mo. 362; High on Receivers, sec. 203, p. 134; *Vermont & Canada Ry. Co. v. Vermont Central Ry. Co.*, 46 Vt. 792. Submitting to the appointment of a receiver by those who were before the court, and had a right to object, and who could have appealed from the order if dissatisfied with it, but did not, is such an acquiescence in the order as renders it the law of the case, with respect to the right to have a receiver. High on Receivers, sec. 37; *Post v. Dorr*, 4 Edw. ch. 412. The authority to appoint a receiver in the case of *Huegel v. Wallendorf* cannot be raised in this proceeding. The regularity of a receiver's appointment, or the competency of the person appointed, cannot be called in question in a collateral proceeding. It is immaterial whether the order of appointment was erroneous or improper; while it is a

Cox v. Volkert.

subsisting order the receiver will be sustained in his possession of the property. High on Rec'rs, sec. 203; *Railroad v. Railroad*, 46 Vt. 792. The appointment of a receiver in the settlement of partnership affairs, falls within that class of incidental powers which courts, having jurisdiction over such cases, have full authority to exercise. It is a legitimate exercise of the jurisdiction of a court of equity. High on Rec'rs, sec. 472; *Sayler v. Mockbie*, 9 Iowa, 209; *Gridley v. Conner*, 2 La. An. 87; Story on Partnership, sec. 330. The objection that plaintiff has no right to sue cannot be raised in this court for the first time. It should have been raised by demurrer or answer, and failing to do that it is waived. *Gimbel v. Pignero*, 62 Mo. 240; *Kellogg v. Martin*, Ib. 429; *Rickey v. Tenbroek*, 63 Mo. 563. All those portions of defendant's answer stricken out, were properly stricken out. That embraced in bracket number seven is pleaded conditionally, which is not allowable. *Bank v. Wagner*, 39 Mo. 387; *Robinson v. Price*, 20 Mo. 229.

BLACK, J.—Huegel, Wallendorf, and Blume, were partners in the milling business, and as such partners built the Pacific Mill in Jefferson City. Wallendorf died, and his executrix, and the other partners, leased the mill to defendant, Volkert, for a period of four years from September 1, 1878. Huegel and Blume filed their petition in the circuit court, the object of which was to procure an accounting, sale, and division of the partnership property, in which suit the executrix and devisees of Wallendorf, and the defendant herein, were made defendants. By consent of all the parties in that suit, Cox was appointed receiver. The defendant, the lessee, paid some six hundred dollars on the lease, and the receiver brought this suit to recover a balance of some one thousand and two hundred dollars rents, alleged to be still due on the lease.

Cox v. Volkert.

1. It is wholly immaterial whether section 3660, Revised Statutes, conferred upon the circuit court authority to appoint a receiver or not. That court had original jurisdiction in all matters of equity. The power of the court to appoint a receiver in the settlement of partnership affairs, is beyond all question. 1 Story's Equity, sec. 672; Adam's Eq. 517; Collyer on Part. 353. This power is inherent in the court, and not dependent upon any statute. No statute deprives the court of that power; hence it had the authority to make the appointment in this case. Whether the court properly exercised the power, cannot be inquired into in this proceeding. The appointment gave the receiver "full power to collect the rents, take care of and preserve the same." This is sufficient authority to collect the rents to become due after the appointment, as well as to collect those due at the date of the appointment. He brought this suit in the court by which he was appointed and prosecutes the same with its sanction, and that is sufficient without producing any express order so to do.

2. Much of the amended answer was stricken out on the ground of alleged inconsistency in this, that it both admitted and denied the execution of the lease. This is a misconception of the purpose and scope of the pleading. It expressly admits that defendant made the lease. This admission must be understood to run through the whole defence, and all parts of the answer. Besides, the counter-claims are based upon the provisions of the lease, and thus, again, its execution is conceded. The fact that defendant may plead the legal effect of the lease differently from the plaintiff does not deny the execution of the lease. The appointment of the receiver did not affect the defendant's rights under the lease. 2 Dan. Ch. Pr., 1407, note 2; 2 Barb. Ch. Practice (2. Ed.) 659. Whatever defences, counter-claims, or set-offs, defendant would have had in a suit by the lessors on this lease, are available to the lessee in

Cox v. Volkert.

a suit by the receiver. The receiver can occupy no better position than those for whom he acts and is appointed. His right to collect the rent is subject to all the conditions of the contract, and to all defences springing therefrom. Hence it follows that any failure on the part of the lessors to perform their part of the contract may be pleaded by the defendant.

While the lease is no part of the pleadings, still the bill of exceptions asks the court to consider the lease in determining the sufficiency of the answer, and this we do, as the cause must be remanded for a new trial. By the terms of the lease the defendant agreed to repack the engine, re-build the fire-front to the boiler, put up a new smoke stack, and put in certain designated machinery, at his own expense, and turn the same over in good repair at the expiration of the lease, and pay sixty dollars per month rents. The lessors agreed to keep the boiler to the engine in good repair, at their expense. Improvements other than those before mentioned, made by the defendant, he has the right to remove. A further stipulation is that, if by reason of any defect in the boiler, the mill should stop running, then the lessee is to pay no rent during such time, and he is to have deducted from the rents all moneys expended in the repair of the boiler. If it becomes necessary to have a new boiler, the same is to be furnished by the lessors, and if the parties disagree as to whether a new boiler is absolutely necessary, or not, the question shall be decided by referees, appointed by the parties in the usual way. From these stipulations it is plain that if the mill stopped running on account of a defective boiler, then, for the time of all such delays the defendant should not be charged with rents, and he should also be allowed for all amounts expended in making repairs upon the boiler. All that portion of the answer setting up these matters should not have been stricken out.

Cox v. Volkert.

It is also alleged that on the eighteenth of September, 1878, the boiler proved to be wholly defective, and could not be repaired so as to furnish sufficient power to run the mill; that the lessors refused to select any referee to determine the question of the sufficiency of the boiler, and thereupon defendant put in a new boiler and had the same in place by the first of October, 1878, at a cost of \$514. If all this be true, in point of fact, the lessee had a right to get a new boiler and charge a reasonable cost thereof to the lessors, and may plead this and should be allowed therefor. In this connection it may be stated that what the boiler inspector of St. Louis said is wholly immaterial as a matter of pleading. His evidence would of course, be competent and relevant on the issues of the condition and fitness of the boiler, but what he said and did have no proper place in the pleading, and this much of the answer might well enough be eliminated, for it presents an immaterial issue. The plain issue here is, was it necessary to have a new boiler in order to furnish power to carry on the business of the mill. If it be shown that the lessors refused to join in the selection of referees, then they cannot avail themselves of a want of determination of the sufficiency and fitness of the old boiler by referees. The proof of the insufficiency of the boiler, and the refusal of the lessors to join in the selection of referees, gives the defendant a right to recover for the cost of the new boiler. If the lessors, by their neglect, prevented the selection of referees, they cannot take advantage of such wrongful act. *Smith v. Railroad*, 36 N. H. 458; *Hotham v. East India Co.*, 1 Term R. 638.

If the defendant undertook to put in a new boiler, he should have put in one reasonably fit for the service. If he did this he would be entitled to reasonable repairs on the new one, for it became the property of the lessors, and he only did what they should have done under the lease. He pleads repairs to the new boiler to the

Cox v. Volkert.

extent of \$781.42. It is not easy to see how the new boiler could cost this amount for repairs, if it was reasonably fit for the service. All these questions, however, can be submitted to the court or jurors, as the case may be tried, upon proper instructions, and the foregoing remarks will be a sufficient guide therefor. It need scarcely be added that the defendant will not be entitled to any rental for the new boiler, and that portion of the answer should be stricken out.

That portion of the answer designated in the record as "bracket 9," viewed in the light of the lease, should also be eliminated. It seeks to recover the alleged decline of price on six thousand bushels of wheat during the time the new boiler was being put in, when it is alleged, but for the defective boiler, defendant would have manufactured the wheat into flour, and sold the same, and thus saved the loss. The contract contemplates that the boiler might become wholly useless. In that event the lessors would have had a reasonable time in which to put in a new one. Had they done so, the measure of the damages, under the terms of the lease, would have been a reduction of the rents during the time the mill was idle. Defendant at once put in a boiler, and his measure of damages must be the cost thereof, and reduction of rents. Had he stood upon the lease, and refused to make the needed additions, we need not say what his measure of damages would have been, for that state of the case is not presented by the record. The motion to strike out parts of the answer should have been sustained only to the extent before indicated.

The judgment is reversed, and the cause remanded for new trial, in accordance with this opinion, and the pleadings will be made to conform hereto. The other judges concur.

Lindenbower v. Bentley.

LINDENBOWER V. BENTLEY, *Administrator, Appellant.*

1. **Landlord and Tenant: ATTORNMENT: POSSESSION: PURCHASER UNDER TRUST DEED.** The purchaser of land at a trustee's sale, made at the request of the administrator of the beneficiary, acquires all the title of the mortgageor and the beneficiaries under the trust deed, and as against them is entitled to the possession; and a tenant, holding under authority of the administrator's lessee, who attorns to the purchaser, becomes the latter's tenant, and thereafter the tenant's possession is the possession of the purchaser.
2. **Trespass: POSSESSION.** Possession of real estate is a pre-requisite to an action for trespass, and one who is not in possession cannot maintain the action.
3. ———: ———: **LANDLORD AND TENANT.** A tenant to whom land is rented, is entitled to its exclusive possession, and being in exclusive possession, the landlord out of possession cannot maintain trespass.

Appeal from Greene Circuit Court.—HON. W. F. GEIGER,
Judge.

REVERSED.

Massey & McAfee for appellant.

Upon the evidence plaintiff was not entitled to recover in this cause. At the time of alleged trespass plaintiff was not in possession of the premises. John C. Crenshaw was at that time owner of said premises, was entitled to possession of same, and Majors, now his tenant, was in actual possession of same, and in actual possession still at time of commencement of this suit. An action for trespass against real estate will not lie, unless plaintiff be in possession at the time of the alleged trespass; nor if defendant is in possession, claiming same under paramount title at the time of commencement of the suit. *Reed v. Price*, 30 Mo. 442; *Cochran v. Whitesides*, 34 Mo. 417; *Brown v. Carter*, 52 Mo. 46; *More v. Perry*, 61

Lindenbower v. Bentley.

Mo. 174; *Frost v. Duncan*, 19 Bar. 560; *Demot v. Hagerman*, 8 Cowen, 220; 9 N. Y. Law Reports, 367. John C. Crenshaw, by virtue of his deed from Abbott, trustee, was entitled to the possession in March, 1881, and was entitled to the growing crops on same, as against the plaintiff. 1 Washburn on Real Property, 124; *Lane v. King*, 8 Wendell, 584; *Harris v. Frink*, 49 N. Y. 24; 10 Am. Rep., 323, 324; *Rowell v. Klein*, 44 Ind. 290; 15 Am. Rep. 235.

Wm. C. Price and Henry C. Young for respondent.

(1) The respondent in this case occupies the same relation that a lessee under an ordinary vendor would occupy. She held under the legal representative of the mortgagee after condition broken. Taking any view of the case, the most Crenshaw, the purchaser, could have done, was to have demanded the rent and exhibited his deed at the time he made such demand, and if respondent had then refused to pay rent he could have proceeded as provided by the sections of the statute referred to. *Gray v. Rogers*, 30 Mo. 248; *Walker v. Harper*, 33 Mo. 592; *Pentz v. Kuester*, 41 Mo. 447. (2) Respondent did not rent the land to Majors, but they were joint croppers or tenants in common in the crops, and the possession of the land upon which the wheat was grown was in respondent at the time of the alleged trespass. Wash. on Real Prop., side p. 365. Letting land upon shares, if for a single crop, is no lease of the land, and the owner alone must bring trespass for breaking the close. The same is held to be the law in the following cases: *Taylor v. Bradley*, 39 N. Y. 129; *De Mott v. Hagerman*, 8 Cow. 221; *Caswell v. Districh*, 15 Wend. 379; *Putnam v. Wise*, 1 Hill, 235; *Herskell v. Bushnell*, 9 Am. Rep. 299; *Bradish v. Schenck*, 8 Johns. 151; *Donnell v. Harshe*, 67 Mo. 173; s. c., 70 Mo. 149; *Bernal v. Hovions*, 17 Cal. 546. (3) If Majors had been the tenant of respondent,

Lindenbower v. Bentley.

he could not have attorned to appellant. The attornment of a tenant to a stranger is void and does not affect the possession of his landlord. *Schultz v. Arnot*, 33 Mo. 172. But Majors was not the tenant of respondent under the law and facts, and respondent was in possession at the time of the alleged trespass.

NORTON, J.—The petition in this case charges that defendant wrongfully entered upon a tract of land, of which plaintiff was in possession, and on which was standing a crop of wheat belonging to plaintiff, and cut and carried the same away to her damage, in the sum of four hundred dollars. On the trial plaintiff obtained judgment, from which defendant has appealed, and assigns for error the refusal of the court to instruct the jury that on the evidence plaintiff was not entitled to recover.

The following statement embodies the facts developed by the evidence:

In 1868 Goza & Quilling were the owners of the land upon which said alleged trespass was committed. At that time they conveyed the same to James Abbott, as trustee, to secure an indebtedness to H. J. Lindenbower, deceased, then in full life. Lindenbower afterwards died, and S. H. Julian became administrator *de bonis non* of his estate. Plaintiff, in 1880, was in possession of said premises. She got possession of the same from said Julian, administrator. In the summer, or fall, of 1880, she rented the land upon which this wheat was grown, to one Payton Majors; Majors was to put the land in wheat on shares; plaintiff was to furnish the seed wheat, and a team to break the land with; Majors was to break the land, sow the wheat, and the crop, when harvested, was to be divided equally between them. This agreement was carried out, except as to the harvesting and dividing the grain. Plaintiff furnished the team and seed wheat. Majors broke the land and sowed the wheat. On the nineteenth of March, 1881, at the request of Julian, ad-

Lindenbower v. Bentley.

ministrator of the estate of Lindenbower, Abbott, trustee, sold said land under and by virtue of said trust deed of Goza & Quilling, and John C. Crenshaw became the purchaser at said sale, paid the purchase money, and received from the trustee, Abbott, a deed therefor.

And afterwards, in May, 1881, defendant, as the agent of John C. Crenshaw, rented the land to said Payton Majors for a period ending July 1, 1881, Majors agreeing to rent of Crenshaw and to pay him as rent the one-half of the wheat crop growing thereon, the entire crop to be harvested and threshed by Majors at his own expense, and the one-half thereof to be delivered to Crenshaw at the thresher. Majors harvested and threshed said crop, and said L. A. D. Crenshaw, as agent of John C. Crenshaw, received at the thresher and took away said one-half of the wheat. Majors, by the further terms of said lease, delivered possession of said premises to said Crenshaw at the time he was required by said lease to do. At the time the land was advertised for sale by Abbott, trustee, Majors, some time in March, 1881, went to Mrs. Lindenbower and asked her what she was going to do about the wheat, now that the land was going to be sold. She said she would see about it and have the wheat reserved from the sale. After the sale, in April or May, Majors again saw plaintiff and asked her what she had done about reserving the wheat from the sale. She said she had forgotten or neglected to attend to having anything done concerning it, and that she would now have to make some other arrangement or do something else about it. The entire crop of wheat harvested was 582½ bushels, of the value of \$1.15 per bushel.

The purchaser of the land at the trustee's sale, made at the request of Julian, administrator, who had previous thereto allowed Mrs. Lindenbower to go into possession of the mortgaged premises, acquired all the title of the mortgageor as well as all the interest of the beneficiaries in the land, and as against them was entitled to the pos-

Lindenbower v. Bentley.

session of the land, and Majors, who was the tenant of Mrs. Lindenbower, who was the tenant of Julian, and he having attorned to the purchaser, thereafter became his tenant, and his possession thereafter was the possession of the purchaser. As possession of real estate is a prerequisite to an action for trespass, and as plaintiff at the time of the alleged trespass was not in possession, the court erred in refusing to instruct that on the evidence and pleadings plaintiff could not recover. *Cochran v. Whitesides*, 34 Mo. 417; *Reed v. Price*, 30 Mo. 442; 61 Mo. 171; 54 Mo. 437. If Lindenbower, the beneficiary in the deed of trust, had rented the land to a tenant and put him in possession, and then requested the trustee to sell it for the payment of the debt secured in the deed, and the purchaser at such sale should then notify the tenant of his purchase, who, upon receiving such notice, attorned to him and agreed to pay the rent to him, can it be successfully contended that Lindenbower could have maintained a suit in trespass against such purchaser for entering upon the land and receiving the rent? We know of no principle on which this could be done. After Lindenbower's death, in reference to the sale of the land, and putting Mrs. Lindenbower in possession of it, Julian, the administrator, represented the beneficiaries in the deed of trust, and neither he, nor those claiming under him, could assert a right to rent as against the purchaser at the trustee's sale, after he had given notice to the tenant, who, upon such notice, attorned to him and accepted possession under him. *Gray v. Rogers et al.*, 30 Mo. 258. Authority for the attornment of the tenant to defendant is found in section 3080, Revised Statutes.

Under such a contract as is shown in this case, while it was held in the case of *Johnson v. Hoffman*, 53 Mo. 504, that the person renting the land and the one to whom it was rented, were tenants in common of the crop, it was also held that the person to whom the land was rented was entitled to the exclusive possession of it. If, then,

The State v. Wilson.

Majors was in the exclusive possession of the land, Mrs. Lindenbower, being out of possession, could not maintain trespass, and her action must fail on that account if on no other. Judgment reversed. All concur, except Judge Henry, who dissents.

THE STATE V. WILSON, *Appellant*.

Criminal Law: MURDER: PRACTICE; INSTRUCTIONS. On a trial for murder, the court should not instruct for a grade of homicide not shown by the evidence.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Thos. Morris for appellant.

B. G. Boone, Attorney General, for the state.

HENRY, C. J.—The defendant was indicted in the criminal court of the city of St. Louis for the murder of Wm. David in said city, on the thirty-first day of July, 1882. On a trial of the cause, he was convicted of murder in the first degree. On his appeal to the St. Louis court of appeals, the judgment was affirmed, and he has appealed to this court. The evidence, on the part of the state, if true, proved a dastardly, deliberate murder. That for the accused a clear case of self-defence. The instructions given on these two theories were correct, and all that could have been asked, and the court did not err in refusing to instruct the jury in relation to murder in the second degree, or manslaughter in any degree. The opinion of the court of appeals,

Farrar v. Heinrich.

delivered by Judge Bakewell, clearly and satisfactorily disposes of every question presented by the record before us, and the judgment is affirmed. All concur.

FARRAR *et al.*, *Appellants*, v. HEINRICH, *alias*
HENRY *et al.*

1. **Ejectment : TITLE.** The elder title when the better one must prevail in an action of ejectment.
2. **Title by Adverse Possession.** An actual, adverse, open, and continuous possession of land under a claim and color of right from 1836 to 1860 was sufficient, not only to bar recovery by those claiming under an elder title, but conferred title upon those claiming under such adverse possession.
3. **Trespass : ADVERSE POSSESSION.** When both parties claim title by possession under color of title, the origin of each being an act of trespass, the one being a trespass on the constructive possession and the other a trespass on the actual possession under the later title, the same rule of law as to the title passing by adverse possession applies to each.
4. **Possession of Tenant : SECOND LEASE.** The possession of a tenant is the possession of his lessor, and the fact that the parties claiming the adverse title without the knowledge of such lessor prevailed on tenant while so in possession under the first lease, to accept a lease from them, cannot affect the possession of such first lessor.
5. — : —. The fact that the second lessors may have made their lease under the mistaken belief that the tenant was a squatter and in ignorance of the existence of the first lease, cannot affect the rights of the first lessor.
6. — : —. If neither party in fact knew, nor had reason to suspect the existence of the lease by the other, and although both acted in good faith in making their respective leases, still such facts cannot help the second lessor. In such circumstances the familiar doctrine and duty of the court is not to interfere, but to leave the parties as it found them.

Farrar v. Heinrich.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

C. & C. E. Gibson for appellants.

(1) It is the settled law of this state that an adverse possession of ten years will not only bar a recovery by the owner, but will confer his title upon the adverse possessor. *Merchants' Bank v. Evans*, 51 Mo. 335; *Shepley v. Cowen*, 52 Mo. 559; *Barry v. Otto*, 56 Mo. 177; *Ridgeway v. Holliday*, 59 Mo. 444. (2) The title to a common field lot, under the act of 1812, emanated from the government upon the passage of the act (*Glasgow v. Lindell Heirs*, 50 Mo. 60), and the limitation began to run from that time in favor of an adverse possession. *Langlois v. Crawford*, 59 Mo. 456. Hence, it follows that the adverse possession of plaintiffs' grantors from 1836 to 1860 conveyed to them the title set up by the defendants, based upon a confirmation by the act of 1812. Therefore, the plaintiffs' grantors had a perfect title to the land in dispute, and were the owners in fee thereof, and in actual possession under fence, at the time the defendants took forcible possession of the same in 1861. (3) The title to the premises never vested in Heinrich, for he never was in possession under claim of ownership, or with the interest to assert an adverse title in himself. *Bowman v. Lee*, 48 Mo. 335; *Bradley v. West*, 60 Mo. 33; *Knowlton v. Smith*, 36 Mo. 507; *St. Louis University v. McCune*, 28 Mo. 481; *Kincaid v. Dormey*, 47 Mo. 337; *Tamm v. Kellogg*, 49 Mo. 118. (4) The statute of limitations would not run in defendants' favor from 1860 or 1861, for the reason that there was nothing to apprise plaintiffs or their grantors that Heinrich was the tenant of his co-defendants, and as such, holding adversely to plaintiffs. Possession of

Farrar v. Heinrich.

land of itself does not constitute title, nor is it necessary evidence of title. Possession of itself evidences only present occupancy by right. *Blaisdell v. Martin*, 9 N. H. 255; *Richard v. Williams*, 7 Wheat. 105; *Lincoln v. Thompson*, 75 Mo. 613. Heinrich's possession only indicated to plaintiffs' grantors that he was the present occupant, and they had a right to treat him as such and were not called upon to speculate whether he held any kind of relations with those who were perfect strangers to them. The bar of the statute of limitations cannot be invoked, unless the facts constituting the adverse possession are sufficiently patent to apprise the owner that his property is adversely claimed. *Fugate v. Pierce*, 49 Mo. 441; *Myler v. Hughes*, 60 Mo. 115; *Leeper v. Baker*, 68 Mo. 400; *Turner v. Hall*, 60 Mo. 277; *Key v. Jennings*, 66 Mo. 356; *Norfleet v. Hutchinson*, 68 Mo. 597; *Alexander v. Polk*, 39 Miss. 755; 3 Washb. R. P. (4 Ed.) 141; Tyler on Ejectment, 909; 4 Mass. 419; *Benge v. Creagh*, 21 Ala. 156; *Brown v. Cockerill*, 33 Ala. 47; *School, etc., v. Lynch*, 33 Conn. 334. The statute of limitations was never designed to apply to a case of this nature. Its object is intended only against those who sleep on their rights, but it was never designed to deprive an owner of his land, when he could not, by the utmost diligence, discover from the marks of adverse possession that others had any claims to it. (5) The point whether Heinrich, by his lease to the plaintiffs, became their tenant is totally foreign to the question, whether the nature and quality of the defendants' possession was such as to confer on them a title by the statute of limitations. Though Heinrich never became the tenant of plaintiffs and never held possession for them, this is no decision that the possession which the defendants held was actual, visible, and notorious, or such a possession as is required by the statute of limitations. The right of plaintiffs to recover against Heinrich cannot be seriously disputed. It would

Farrar v. Heinrich.

be a plain fraud for him to take a lease for the expressed and avowed purpose of turning the possession over to plaintiffs' grantors, and in every way holding possession under and for them, and then to turn up a secret lease to his co-defendants, drawn like a trump card from under the table, and claim the title to the land; such claim must be rejected, although it is a trump. The co-defendants are in no better position than Heinrich.

D. T. Jewett for respondents.

(1) The lower court found that Polk and his associates, in good faith claiming title to the land, took possession of the same in 1860, where it crossed the New Madrid Survey, in the name of Genereaux, and fenced it up separately from that survey, that he and his associates put the tenant Heinrich on it under a lease, and that Heinrich went on as tenant of Polk and others, in good faith, and not as a trespasser. The court, as trier of the facts, having thus found, this court is concluded by such finding in view of the fact that there was evidence to justify it. Attornment means the abandonment of one landlord and the accepting of another. This was not done by Heinrich; he did not abandon the first, and did not accept a second as a substitute, as he never paid the second any rent. But let the plaintiffs call it an attornment if they please. The statute (section 3080, R. S. of 1879) says the act is void and shall not affect the possession of the landlord. See, also, the following cases where the force and effect of the statute have been construed: *Schultz v. Arnot*, *Lindell et al.*, 3 Mo. 172; *Rutherford v. Ullman*, 42 Mo. 216; *McCartney v. Auer*, 50 Mo. 395; *Bank v. Clavin*, 60 Mo. 559.

J. E. Munford also for respondents.

Adverse possession for ten years will not only bar

Farrar v. Heinrich.

a recovery by the true owner, but will extinguish his title and confer it on the adverse occupant. On this point see: 59 Mo. 444; 56 Mo. 177; 47 Mo. 282; 44 Mo. 596; 38 Mo. 561; 37 Mo. 408; 33 Mo. 35; 30 Mo. 99; 16 Mo. 273; 13 Mo. 335; 11 Mo. 3. The possession need not be actual, but the usual acts of ownership is sufficient. See: 68 Mo. 400; 66 Mo. 356; 60 Mo. 420; 49 Mo. 441; 22 Mo. 70; 20 Mo. 186.

RAY, J.—This is an action of ejectment for the possession of a lot of land in the western part of the city of St. Louis, described in the petition. The suit was commenced in 1877 against Heinrich alone, who was in the actual possession of the premises. The court, on motion of J. E. Munford and the heirs of Trusten Polk, who claimed to own the premises in fee, and that Heinrich was their tenant, admitted them as co-defendants.

The petition is in the usual form; the answer denies the allegations of the petition, pleads adverse possession, the statute of limitations and title in defendants. A jury being waived, the cause was tried by the court. The testimony material to the case was substantially as follows: The plaintiffs gave in evidence a patent issued in 1829 on a New Madrid location in the name of Joseph Genereaux or his legal representatives, which embraced and covered the land in dispute and other lands besides. They, also, gave in evidence various deeds from the heirs of said Genereaux down to themselves. They also gave evidence that N. P. Taylor, under whom they claimed title in 1836, took possession and fenced the whole of said Genereaux survey, and that he and his heirs continued to occupy and live upon the same, under claim of title until 1860, when Trusten Polk and his associates crossed over said fence and took possession of the tract now in dispute and fenced up the same separate and distinct from the balance of said inclosure, as hereafter stated.

Farrar v. Heinrich.

The defendants, on their part, put in evidence a confirmation by the United States of a common field lot in the Grand Prairie Common Field of St. Louis to Francis Faustin dit Parent, under the act of congress of June 13, 1812, and a survey of the same by the United States duly made, recorded, and numbered 1661. This confirmation and survey also embraced and covered the land in controversy and so fenced up by said Polk and associates. Defendants also gave in evidence various deeds for said common field lot from persons claiming to be heirs and legal representatives of said Faustin dit Parent to Trusten Polk and Vandeventer, under whom said co-defendants claimed title. These deeds bore date prior to 1861. The evidence shows that in 1860, Polk and associates, under color of title, took possession of that part of the Genereaux survey, which is covered by said confirmation and survey 1661, in name of said Faustin dit Parent, as before stated. They took down the fences put there by Taylor, and fenced up that portion of the Taylor tract covered by said confirmation and survey in the name of Faustin, separate and distinct from the balance of the Taylor inclosure as aforesaid. Afterwards, in 1861, Polk and associates put the defendant, John Heinrich, into the possession of the land thus fenced up by them, and gave him a lease of the land as their tenant at an annual rent of eighty dollars. The first lease so given to Heinrich, was dated February 23, 1861. Subsequent leases given by the same parties to Heinrich, call for an annual rent of ninety dollars. The proof is, that Heinrich continued to occupy said land from the time he was first so put in possession till the commencement of this suit, as the tenant of the Polk heirs and associates, paying regularly the amount of rent stipulated in said leases. In 1863, Major Bryan and J. G. Page, claiming to represent the heirs of Taylor, went to the land and told Heinrich that the land he was occupying belonged

Farrar v. Heinrich.

to the heirs of Taylor, and that unless he took a lease from them, they would turn him out. They offered him a lease for one year at a nominal amount of one dollar, and he took it. He afterwards took other leases from them at the same nominal rent. These leases from the Taylor heirs covered other lands besides the tract now in dispute.

During all the time, from February, 1861, the date of the first lease, to the commencement of this suit in 1877, said Heinrich continued to pay rent at eighty and ninety dollars per year to Polk and his associates who claimed title under said Faustin dit Parent. There is no pretense that Polk and associates knew anything of the leases of the Taylor heirs to said Heinrich, and the Taylor heirs claim that they had no knowledge of the Polk leases to Heinrich when they gave him their leases, and the evidence is not clear that they had such notice. It does not appear that Heinrich had any hand in taking possession of the land in 1860, or ever saw it till put on it in 1861, as tenant of Polk and his associates.

At the conclusion of the testimony, the court, at the instance of the plaintiffs, gave the following instruction :

"If the jury find from the evidence that N. P. Taylor took actual possession, fenced in the whole of the Genereaux tract in 1836, and that he and his heirs continued in such actual possession for more than twenty years thereafter, and that said tract embraced and covered the premises in dispute, such possession was effectual to convey to said Taylor and his representatives all the right and title confirmed to Faustin dit Parent or his representatives, and such possession vested in said Taylor and his representatives the documentary title set up by Polk and others under said Parent or Faustin and given in evidence by the defendants in this case."

"If N. P. Taylor and his representatives took the actual possession of the Genereaux tract by fencing up

Farrar v. Heinrich.

the whole of it and held such possession, claiming the tract in fee for more than twenty years prior to the entry of the defendants, or those under whom they claim, such possession vested the fee in said Taylor's representatives."

The following instructions asked by plaintiffs were refused by the court, the plaintiffs duly excepting:

"If N. P. Taylor and his representatives took and held the actual possession under fence of the whole of the Genereaux tract for more than twenty years, and the premises in dispute are a part of the same, and the defendant Henry, or his lessors, after a lapse of said twenty years, and while the Genereaux tract was so fenced in and in possession of the representatives of said Taylor, crossed over their fences and fenced up the premises in dispute, then said Henry and those under whom he entered were co-trespassers, and said Henry might lawfully re-deliver the premises in dispute to said Taylor's representatives, although he was put in possession by his co-defendants as their tenant."

"If Taylor and his heirs had been in the actual possession of said premises for twenty years, and the defendants took possession thereof as trespassers, and as soon thereafter as the intrusion was known to the Taylor heirs, they demanded of John Henry the re-delivery of the possession to them, and if said Henry was the only person in the visible and actual possession, and was the only person known to them as being or claiming to be in such possession, and thereupon said Henry took a lease from them and admitted himself as holding possession under and for them, then the possession of said Henry was not adverse to the heirs and representatives of said Taylor, so long as he continued to acknowledge them as his landlords, even if he had entered upon said premises under and as tenant of his co-defendants or their ancestors in the title, and held, also, a lease from them."

Farrar v. Heinrich.

At the request of defendants, the court gave the following instructions :

"1. If the court, as trier of the facts, finds from the evidence that Trusten Polk, or he and his associates, claiming the land in dispute, in good faith, put the defendant John Heinrich on the land in 1861 as their tenant, and he has continued since that time on said land, paying rent to them as their tenant, then the court is requested to declare the law to be, that no attornment of Heinrich to any claimant, without the consent of Polk and his associates could destroy his relation as tenant of Polk and others."

"2. If the court, as trier of the facts, finds from the evidence that Trusten Polk and his associates, in good faith, claimed to own the land in dispute, and in February, 1861, leased the land to defendant Heinrich, and that Heinrich went into possession of the same, *in good faith, as tenant of Polk or his heirs and associates*, and he continued and was such tenant in October, 1863, when he signed the papers produced by plaintiff, wherein he agrees to hold possession of what is there called lot twelve of the Taylor place, for the Taylor heirs, and that lot twelve covers the land in dispute, and, also, other lands claimed by Taylor, then the court is requested to declare the law to be that said paper of October, 1863, is wholly void and inoperative to destroy the tenancy of Heinrich under Polk, whether Heinrich did or did not notify the agents of the Taylor heirs that he was a tenant of Polk as to the land in dispute, and the same rule would apply to any other similar undertaking of Heinrich."

"3. If the court, as trier of the facts, finds from the evidence that in 1861 Trusten Polk, or that he and his associates, in good faith, claimed the land in dispute and leased it to defendant Heinrich, and that ever since 1861 said Heinrich has occupied said land, paying rent, as

Farrar v. Heinrich.

tenant, to Polk and his associates and heirs, and that Polk and his associates and heirs have thus, through said tenant, had open, notorious, continuous, and exclusive possession of said land for more than ten years next before the commencement of this action, then the court is requested to declare the law to be, that such possession gives defendant Polk and his associates title and plaintiffs cannot recover."

To the giving of which, the plaintiff duly accepted.

There was a verdict and judgment for defendant, and the plaintiffs having made an unavailing motion for a new trial, appealed the case to the court of appeals, where the judgment was by consent affirmed *pro forma*, from which judgment an appeal has been duly prosecuted to this court. The only question before us on this record is, the propriety of the action of the trial court in giving and refusing said instructions. It is conceded that the title based upon a confirmation, under the act of congress of June 13, 1812, to a "common field lot," and a survey thereof by the United States is a better title than the one based on a patent issued in 1829, on a New Madrid location and a survey thereof for the same tract of land. The elder title is conceded to be the better title, and, in general, must prevail in an action of ejectment. *Glasgow v. Lindell's Heirs*, 50 Mo. 60; *Langlois v. Crawford*, 59 Mo. 456. But it is contended by the plaintiffs, and rightfully so contended, that the actual, adverse, open, and continuous possession of the tract in question by the plaintiffs and those under whom they claim from 1836 to 1860, under claim and color of title, will not only bar a recovery by those claiming under the elder title, but will, also, confer title upon those claiming under such adverse possession, for such is the settled law of this state. *Merchants' Bank v. Evans*, 51 Mo. 335; *Shepley v. Cowan*, 52 Mo. 559; *Barry v. Otto*, 56 Mo. 117; *Ridgeway v. Holliday*, 59 Mo. 444.

Farrar v. Heinrich.

It must be conceded, therefore, that in 1860, when Polk and his associates took forcible possession, those claiming under Taylor had become the owners in fee of the tract in dispute, although the same was covered by the elder title of the confirmation and survey under the act of June, 1812, under which Polk *et al.* claimed when they so entered. It may be conceded, also, that Polk *et al.* were trespassers when they intruded upon the actual possession and inclosure of the Taylors in 1860; but it must, also, be conceded that Taylor was, also, a trespasser in 1836, when he intruded upon the constructive possession, which the legal title of Faustin dit Parent conferred upon those claiming thereunder. In this particular, there is, therefore, no difference between the origin of the respective titles under which these litigants claim and must rely. Both titles had their origin in an act of trespass, the one being a trespass upon a constructive possession, the other upon an actual possession. It must, therefore, be conceded that the same rule of law and doctrine which conferred title to the tract in dispute upon the Taylors, by reason of their adverse possession under claim and color of title, also conferred title upon Polk and his associates by reason of their adverse possession of the tract in dispute from 1860 or 1861 to 1877, when this suit was brought. The fact that the defendant Heinrich, for most of that period, was in the actual occupancy of the land, yet, as he held the same under a lease from Polk and his associates, and as their tenant paying rent therefor regularly, the law made his possession the actual possession of his landlords, Polk *et al.*, under whom these co-defendants claim title.

The further fact that Bryan and Page, claiming to represent the heirs of Taylor, went to the land in 1863, and without the knowledge of Polk and associates, prevailed upon said Heinrich while he was in the possession of said land, as tenant of Polk *et al.*, to accept a lease of

Farrar v. Heinrich.

the same from the Taylor heirs, cannot in any wise affect the possession of his landlords, Polk *et al.* Under the law, both statute and common, such a lease so given and accepted is wholly void and inoperative as to said landlords and those claiming under them. R. S. of 1879, sec. 3080; *Schultz v. Arnot, Lindell et al.*, 33 Mo. 172; *McCartney v. Auer*, 50 Mo. 395; *Bank v. Clavin*, 60 Mo. 559. Under the facts of this case it is not perceived how the fact that Heinrich, the tenant, at the date of the Taylor leases, may have been the only party in the visible, actual possession of the premises, and the further fact (if such it was) that the Taylor heirs may have supposed him to be a mere squatter, and may not have known that he was a tenant of Polk *et al.* under a lease, paying rent therefor, can in any way or to any extent alter the law as to Polk and his associates who never knew or consented to the Taylor leases in any manner. The fact that the Taylors may have supposed the tenant to be a mere squatter on the premises and may not have known that he held possession for the Polks under a lease from them and as their tenant, may be their misfortune, but under the facts, manifestly, is not the fault of Polk and his associates. They did nothing to make that impression, or to prevent them from inquiring of Heinrich, if they had been so disposed, by what right or title he held or claimed the premises. Such an inquiry would have been but natural, and, under the facts, was probably their duty. Why they refrained from such inquiries, does not appear. Even if Heinrich, without the knowledge or consent of the Polks, should have intentionally misled them in that particular, it is not perceived why this duplicity of the tenant should prejudice or affect the legal rights of the landlords. But concede, as claimed by appellant, that Heinrich, the tenant, never informed either party of having any lease from the other, and that neither party in fact knew, or had reason to suspect the existence of such lease, or

Coover v. Johnson.

holding from the other, and that both parties acted in the utmost good faith in the premises, still it is not perceived how this state of facts can help the plaintiffs. In such circumstances, the familiar doctrine of the law and duty of the court is not to interfere between such parties and litigants, but leave them where it found them. In any event, the plaintiffs, under the facts, were not entitled to recover and there was, therefore, no error on the part of the court in giving or refusing said instructions, and for these reasons the judgment of the court of appeals is affirmed. All concur.

COOVER, *Appellant*, v. JOHNSON.

1. **Conditional Sale of Personal Property :** STATUTE. The vendor of personal property may contract with his vendee that the title shall remain in the former until the purchase price is paid, and such contract will be valid as against creditors of the vendee or purchasers from him with notice of the contract, although such condition was not evidenced by writing, executed and acknowledged by the vendee and recorded, as required by statute. R. S., secs. 2505, 2507.
2. **Signification of Terms.** "Without notice" and "in good faith" are equivalent terms.

Appeal from Greene Circuit Court.—HON. W. F. GEIGER, Judge.

AFFIRMED.

W. D. Hubbard and J. P. McCammon for appellant.

(1) There was a delivery of the scales to the vendee.
1 Pars. on Cont. (6 Ed.) bottom page 638, side page, 603 ;

Coover v. Johnson.

2 Kent's Com. (4 Ed.) top pages 498, 499, side pages 499, 500, 544-5; *Williams v. Gray*, 39 Mo., side page 201, and authorities cited; *Comstock v. Affolter*, 50 Mo. 411; *State to use of Gales v. Fitzpatrick*, 64 Mo. 185. (2) The declarations of law asked by interpleaders and given, as well as those asked by plaintiff and refused by the court, show that the case was decided on the theory, that, as Johnson's debt to plaintiff was an antecedent debt, contracted before the scales were bought by Johnson, therefore, plaintiff could not hold the scales against interpleaders. But one who takes personal property in payment of an antecedent debt is a *bona fide* purchaser for value. *Hess et al. v. Clark et al.*, 11 Mo. App. 492; *Lee v. Kimball*, 45 Me. 172; *Greene v. Kennedy*, 6 Mo. App. 577; *Butters v. Haughwout*, 42 Ill. 18, and cases there cited. (3) An unrecorded deed will not be valid as against creditors, even if known to them, when it would be valid as to a subsequent purchaser if known to him. 3 Washburn on Real Prop. (4 Ed.) 323; *Washington v. Trousdale*, Mart & Y. 385, 391; *Lillard v. Rucker*, 9 Yerg. 64, 73; *Edwards v. Brinker*, Dana, 9; *Ring v. Gray*, 6 B. Mon. 368, 374; *Guerrant v. Anderson*, 4 Rand. 208. (4) The contract between interpleaders and defendant Johnson having been neither acknowledged nor recorded, and the possession of the scales having been delivered to Johnson, the sale to him was subject to no conditions, whatever, as against Coover, a creditor of Johnson. Interpleaders, when they had it wholly in their power to secure themselves, by their own negligence and laches, forfeited all rights to the scale as against attaching creditors. R. S., secs. 2505, 2507.

John O' Day for respondent.

(1) A sale and delivery of goods, on condition that the title to the property is not vested until the purchase

Coover v. Johnson.

money is paid or secured, does not pass the title to the vendee until the condition is performed and the vendor, in case the condition is not fulfilled, has the right to repossess himself of the goods both as against the vendee and his creditors. *Ridgway v. Kennedy*, 52 Mo. 24; *Little v. Page*, 44 Mo. 412; *Griffin v. Pugh*, 44 Mo. 326; *Parmlee v. Catherwood*, 36 Mo. 476; *Robbins v. Phillips*, 68 Mo. 100; *Wangler v. Franklin*, 70 Mo. 659. "No sale of goods is complete in the vendee, nor is he entitled to an immediate right of property, so long as anything remains to be done by the vendee." *Henning v. Powell et al.*, 33 Mo. 474; *Bass v. Walsh*, 39 Mo. 192; *Freight Co. v. Stanard*, 39 Mo. 71. There is no disputed question of fact in this case. Plaintiff admits that the debt on which he sued Johnson and attached the material for the scale, was contracted and due years before the conditional contract of sale made between Johnson and respondent; also that he knew at the time the agreement was made that Johnson paid no part of the purchase money, and that the title was to remain in Fairbanks & Company until the scale was paid for. Appellant is not a subsequent creditor, within the meaning of the term as used in the statute, which provides that conditional sales of personal property shall be void as to subsequent purchasers (in good faith) and creditors, unless the conditions be evidenced by writing and acknowledged and recorded, as in case of mortgages.

SHERWOOD, J.—Johnson bought a pair of scales of Fairbanks & Company. The sale was a conditional one, the title being retained in the vendors until the property should be fully paid for. Johnson, after the scales were shipped to him at the town of Republic, paid the freight, receipted for them, asked and received permission of the station agent for them to remain in the freight house at Johnson's risk. This permission was shortly thereafter extended on the same terms, the sta-

Coover v. Johnson.

tion agent agreeing to ship the scales to Johnson in the state of Kansas, to which state Johnson soon afterwards went, not having paid any portion of the purchase money. Coover is a creditor of Johnson's of some years standing, a portion of the indebtedness having accrued as far back as 1878, and all of it prior to the time Johnson bought the scales. The note in suit is dated January 23, 1882, due one day after date, and matured the day Johnson made his exit. Coover kept store in Republic; was well acquainted with Johnson, who, at one time, had done business for him; knew of his intended departure two or three days before it occurred, and prior to suit brought, was thoroughly conversant with the terms of the contract of sale made between Fairbanks & Company and Johnson.

Coover having brought suit against Johnson and attached the scales referred to, Fairbanks & Company interpleaded, claiming them as their property, and on trial had of their interplea, the foregoing facts were elicited. On those facts the court, at the instance of the interpleaders, declared the law as follows:

"That if you believe from the evidence that Johnson was indebted to Coover for the debt sued on in this suit, at the time he executed the contract of purchase with Fairbanks & Company for the scales, and that Johnson left the country and failed to carry out his contract with Fairbanks & Company, and you further believe that Coover knew the terms and conditions upon which Johnson purchased said scales, and, with that knowledge, attached the scales in controversy as the property of Johnson on said debt due from Johnson to him (Coover), then the judgment should be for the interpleaders, Fairbanks & Company."

But the court, though requested by plaintiff so to do, refused to declare the law that:

"1. The condition in the contract of sale in

Coover v. Johnson.

evidence, that Fairbanks & Company do not relinquish their title to the scales and its attachments in question until said property in question is paid for, is null and void as to creditors of defendant Johnson, said contract not having been acknowledged and recorded as in case of mortgaged personal property; and if the evidence proves that defendant Johnson owed the plaintiff, Coover, the note here sued on, when this suit of Coover's was commenced, and that the scale and its attachments were shipped by interpleaders from St. Louis to Republic, Mo., on the railroad, to defendant Johnson, and at Republic delivered by the railroad company to Johnson, and plaintiff Coover afterward had said property attached in this suit, then interpleaders cannot recover it in this proceeding." Other declarations of law were given, and others refused, but those just copied present and contain the kernel of this cause.

It has frequently been decided in this state that the seller of personal property might, by contract with the buyer, reserve the title of such property in himself until payment was made, and that such reservation would be valid even as against a *bona fide* purchaser. *Wangler v. Franklin*, 70 Mo. 659, *Robbins v. Phillips*, 68 Mo. 100, and cases cited; *Sumner v. Cotley*, 71 Mo. 121. But those adjudications were made in cases which arose prior to the statutory provisions to which plaintiff's counsel have called our attention. Section 2505, Revised Statutes, 1879, contains an amendment of, or clause additional to, section 10, General Statutes, 1865, chapter 107, enacted in 1877, in these words: "And no sale of goods and chattels, where possession is delivered to the vendee, shall be subject to any condition, whatever, as against creditors of the vendee, or subsequent purchasers from such vendee in good faith, unless such condition shall be evidenced by writing, executed and acknowledged by the vendee, and recorded as now provided in cases of mortgages of personal property." Section 2507, Revised

Coover v. Johnson.

Statutes, 1879, is an original section enacted for the first time in 1877, and contains similar prohibitory provisions, declaring that "such condition in regard to the title so remaining, shall be void as to all subsequent purchasers in good faith, and creditors, unless," etc. It cannot be doubted that the legislature, by these sections, intended to make a radical change in the law relating to conditional sales of personal property, and to prevent secret and unrecorded transactions and contracts of sale from being used to the detriment of unsuspecting creditors of, or purchasers from, the vendee of personal property apparently the owner thereof. This I regard as the whole object, purpose and scope of the law, as it now stands. Here, so far as the attaching creditor was concerned, there was in fact no secret lien, no hidden trust, no false appearance, no concealed ownership; nothing, in short, to induce him to alter his condition, incur needless litigation or expense, or which could in any manner operate to his prejudice.

There is a wide divergence in judicial opinions as to the legal effect which should be given to conditional sales of chattels, when by the terms of the contract of sale there is a reservation of title in the vendor; but, except where controlled by statutory regulation, all the authorities concur in holding the condition binding as between the parties. And even those authorities which, uncontrolled by statute, hold that title will pass to a *bona fide* purchaser, deny this result where the purchaser has notice. *Stadtfield v. Huntsman*, 24 Alb. L. J. 185; 1 Benj. on Sales, sec. 425. In Illinois, by statutory provision, all such agreements are treated as chattel mortgages, and void, as to third persons, if not recorded in like manner as such instruments. The statute of that state makes no exception in favor of any person, whatsoever. Notwithstanding this, in a somewhat recent case in that state, special stress was laid on the fact that the creditor was *bona fide*, having no reason but to rely on the apparent ownership of

Coover v. Johnson.

the property by his debtor; and it was there ruled that in this regard a purchaser without notice and a *bona fide* creditor stand on the same footing of equal protection.

Van Duzor v. Allen, 90 Ill. 499. In respect to a similar statute in our own state, section 2503, Revised Statutes, 1879, in relation to mortgages of personal property, and requiring them to be recorded, in order to their validity against third persons, no exception having been made in favor of any one, it has been several times ruled that even if a purchaser had *actual knowledge* of the mortgage, he would, nevertheless, obtain a good title. *Bryson v. Penix*, 18 Mo. 13; *Bevans v. Bolton*, 31 Mo. 437. And, in regard to section 2500, Revised Statutes, 1879, touching loans of personal property, and making their registry requisite, so as to be valid against creditors and purchasers, but containing no exception, a like ruling has been made. *Cook v. Clippard*, 12 Mo. 379.

If it be presumed that the legislature was not ignorant of the rulings in the cases just cited, and taking this for granted, it must be apparent that when they inserted the words "as against creditors of the vendee or subsequent purchasers from said vendee in good faith," in section 2505, and similar words in section 2507, their design was to prevent actual knowledge in a purchaser or creditor from being held in less esteem than constructive notice, as imparted by the record. The sections in question are somewhat awkwardly worded, but I am persuaded that the expression *bona fide* applies as well to creditors as to subsequent purchasers. Indeed, no reason can be discovered why the one class should receive greater legislative favors than the other. Such statutes as the sections under discussion, have of late years been enacted in many of the states, as, for instance, in Vermont, where the statute provides that: "No lien reserved on property sold conditionally and passing into the hands of the conditional purchaser, shall be valid against attaching creditors or subsequent purchasers

Phillips v. The Missouri Pacific Ry. Co.

without notice, unless," etc. And upon this statute it was ruled that as the contract of sale was not placed on record, the property sold "was open to attachment, as the property of the conditional vendee, unless the plaintiff could show that the attaching creditor *had notice of the conditional sale*. *Whitcomb v. Woodsworth*, 54 Vt. 544. A decision of like effect, on similar statutory provisions, has been made in Iowa. *Singer Sewing Machine Co. v. Holcomb*; 40 Iowa, 33.

The language of the statutes just cited, "attaching creditors or subsequent purchasers without notice," is not essentially different in point of legal effect from the phraseology employed in our own law. "*Without notice*" and "*in good faith*" are equivalent terms. *Lee v. Bowman*, 55 Mo. 400.

Holding these views, the judgment should be affirmed. All concur.

PHILLIPS V. THE MISSOURI PACIFIC RAILWAY COMPANY
Appellant.

1. **Double Damage Act, Constitutionality of.** The former decisions of this court holding that the double damage act (R. S., sec. 809) is not in contravention of either the state or federal constitution, sustained.
2. **Constitutional Law: CONSTRUCTION: PRESUMPTION.** Acts of the legislature are presumed to be constitutional, and it is only where they manifestly infringe on some provision of the constitution that they can be declared void for that reason. In case of doubt, every possible presumption, not directly inconsistent with the language and subject, is to be made in favor of the constitutionality of the act.
3. **Revised Statutes, Section 2835, Constitutionality of.** Section 2835, of the Revised Statutes, is not in violation of article four, section fifty-three, subdivision seventeen, of the constitution

Phillips v. The Missouri Pacific Ry. Co.

of Missouri, prohibiting the general assembly from passing "any local or special law regulating the jurisdiction of justices of the peace," nor is it a special act because directed against railroads alone.

4. **Special Law.** An act of the legislature which applies to and embraces all of a class of persons who are or may come into like situations or circumstances is not a special law.

Appeal from Cooper Circuit Court.—HON. E. L. EDWARDS, Judge.

AFFIRMED.

Smith & Krauthoff for appellant.

(1) Section 2835, Revised Statutes, is in violation of article four, section fifty-three, subdivision seventeen, of the constitution of Missouri, which provides that the general assembly shall not pass any local or special law regulating the jurisdiction of justices of the peace. "A special law is one referring to a selected class." *Earle v. Board of Education*, 55 Cal. 489; *State ex rel. v. Wilcox*, 45 Mo. 465; *State v. Hermann*, 75 Mo. 340; *Cooley's Const. Lim.* 391; *Bouv. Law Dic.*, Tit. "Special." It is not too late to raise this objection for the first time in this court. The question of jurisdiction is never waived. *R. S.*, 1879, sec. 3519; *State ex rel. v. Griffith*, 63 Mo. 545; *Bateson v. Clark*, 37 Mo. 31; *Nance v. Ry. Co.*, 79 Mo. 196; *Graves v. McHugh*, 58 Mo. 499. (2) It is also in violation of the constitution of the United States, article fourteen, section one, which provides that no state "shall deny to any person within its jurisdiction the equal protection of the laws." *Cooley on Constitutional Limitations*, secs. 128, 129, and note; *Potter's Dwarrris on Stat. and Const.*, pp. 52, 53; 1 *Kent Com.* 459; *State ex rel. Henderson v. Boone Co.*, 50 Mo. 317; *State v. New Madrid Co.*, 51 Mo. 86, 88; *Hall v. Bray*, 51 Mo. 293; *State ex rel. v. Wilcox*, 45 Mo. 465; *Thomas v. Board of Com.*, 5 Ind. 5; *Gentile v. The*

Phillips v. The Missouri Pacific Ry. Co.

State, 29 Ind. 409; *Devine v. Comrs. of Cook Co.*, 84 Ill. 592; *Earle v. S. F. Board of Equalization*, 55 Cal. 490; *Williams v. Bidleman*, 7 Nev. 70; *State v. Hammer*, 42 N. Y. 435. (3) Section 809, Revised Statutes, is in violation of section one, article fourteen, amendments to the constitution of the United States, and section twenty, article two, section thirty, article two, section fifty-three, article four, and section eight, article eleven, of the constitution of Missouri.

Draffen & Williams for respondent.

That section 809, Revised Statutes, is constitutional, has been too frequently determined by this court, to be now seriously considered, and the judgment should be affirmed. *Spealman v. The Mo. Pac. Ry. Co.*, 71 Mo. 434; *Cummings v. The St. L., I. M. & S. Ry. Co.*, 70 Mo. 570; *Barnett v. A. & P. Ry. Co.*, 68 Mo. 56.

NORTON, J.—This action was commenced before a justice to recover double damages under section 809, Revised Statutes, for stock alleged to have been killed by defendant. Judgment was obtained in the justice's court, from which defendant appealed to the circuit court, where judgment was again rendered for plaintiff, from which an appeal is prosecuted to this court.

It is argued by defendant's counsel that section 809, Revised Statutes, known as the double damage act, is in contravention both of the federal and state constitutions and, therefore, void. This question was considered in the cases of *Barnett v. Ry. Co.*, 68 Mo. 56; *Spealman v. Ry. Co.*, 71 Mo. 434; *Humes v. Ry. Co.*, 82 Mo. 221, and in all of them the constitutionality of the act was affirmed. In the case last cited it is exhaustively considered by Commissioner Philips, who wrote the opinion, and we do not feel called upon to add anything to what is there said. Since the above cases were

Phillips v. The Missouri Pacific Ry. Co.

decided the Supreme Court of the United States in the case of *Terry v. Mo. Pac. Ry. Co.*, (not yet reported), has expressly held said section 809, to be not repugnant to the constitution of the United States.

It is also insisted by counsel that section 2835 of the Revised Statutes, conferring jurisdiction upon justices of the peace of "all actions against any railroad company in the state to recover damages for injuring or killing horses, etc., without regard to the value of such animal or the amount claimed for killing or injuring the same," is in violation of section fifty-three, subdivision seventeen, article four of the state constitution, and is, therefore, void. The section on which the argument is based is as follows: "The general assembly shall not pass any local or special law regulating the jurisdiction of justices of the peace."

In the determination of a question involving the constitutionality of a law, it is a settled rule for the guidance of courts that the acts of the legislature are presumed to be constitutional, and it is only where they manifestly infringe on some provision of the constitution that they can be declared void for that reason. In case of doubt every possible presumption not directly inconsistent with the language and subject matter is to be made in favor of the constitutionality of the act. *State v. Able*, 65 Mo. 357. Guided by this rule we can reach no other conclusion than to pronounce the act in question valid. Section 2835 is a general and not a local or special law. It does not apply alone to a single justice of the peace, or to the justices of a single county, nor does it give to justices of the peace of one county a different jurisdiction from that given to all the justices of all the counties in the state, but it applies alike to all the justices in every county, and confers like jurisdiction upon all of them in the class of cases to which it refers. It cannot, therefore, be properly claimed that said section of the statute is in violation of the section

Rhorer v. Brockhage.

of the constitution invoked by defendant, which forbids the legislature from passing a local or special law regulating the jurisdiction of justices of the peace. The legislature has the undoubted right by a general law to regulate the jurisdiction of such justices, and it has done nothing more than this in the enactment of said section.

It is also insisted that said act is special because it is directed against railroads alone. If the act had provided that justices of the peace should have jurisdiction of cases against a single railroad only, it might be subject to the objection urged, but it does not so provide; it does not apply only to one railroad of a class, but it applies to all railroads in the state as a class. Class legislation is not necessarily obnoxious to the constitutional provision relied on. "It is a settled construction of similar constitutional provisions that a legislative act which applies to and embraces all of a class of persons 'who are or may come into like situations and circumstances' is not partial." *Humes v. Railroad*, 82 Mo. 221, and cases cited. Judgment affirmed, in which all concur.

RHORER, *Trustee, Appellant*, v. BROCKHAGE.

1. **Homestead, Right of Widow to Alienate.** Under Revised Statutes, section 2693, the homestead vests in the widow and minor children, upon the death of the husband, and continues for their joint benefit until the youngest child shall have attained its legal majority, and the widow has no right to dispose of, abandon or otherwise deal with it to the impairment of the children's right to use it as a homestead.
2. **Homestead, Right of Widow and Minor Children to.** Under the present law (R. S., sec. 2693) the widow and minor children are entitled to a homestead, regardless of whether or not the decedent left any debts.

Rhorer v. Brockhage.

3. **Homestead: RIGHTS OF MINOR CHILDREN.** The rights of the minor children in the homestead are in no manner affected by its abandonment by the mother. Although they may accompany her to another home, their rights in the homestead continue.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

C. P. & J. D. Johnson for appellant.

(1) Under the Missouri law, the homestead is an exemption from attachment and execution when used as a home. R. S., secs. 2691, 451. (2) And this exemption from attachment and execution of the home, when used as such, passes to and vests in the widow and children at the death of the housekeeper, and continues for their benefit without being subject to the debts of the deceased, but his entire interest and estate, except this exemption from execution and attachment thus continued, is subject to the laws relating to devise, descent, dower, partition and sale. R. S., sec. 2693, p. 451; *Poland v. Vesper*, 67 Mo. 727. (3) The homestead exemption is a right—an immunity from attachment and execution at the hands of creditors only—but is not an estate. *Black v. Curran*, 14 Wall. 463; *Hewett v. Templeton*, 43 Ill. 367; *Turner v. Bennett*, 70 Ill. 263; *Robinson v. Baker*, (Mich.) 11 N. W. Rep. 410. (4) When the householder dies intestate, without debts and without alienation, his real estate is subject to descent, dower, partition, etc., between the widow and heirs, the same as if the homestead law had no existence upon the statute book. R. S., sec. 2691; *Bennett v. Turner*, 70 Ill. 263; *Sontag v. Schmisser*, 76 Ill. 541; *Fight v. Holt*, 80 Ill. 84; *Hagar v. Nixon*, 69 N. C. 108; *Robinson v. Baker*, 11 N. W. Rep. 410. (5) Use as a home is one of the statutory conditions of a homestead, therefore, the

Rhorer v. Brockhage.

right and exemption may be lost by abandonment—and the mother or surviving father can, by abandoning the homestead, deprive the children of this right. After the death of the father, the mother becomes the protector of the children, and her domicile and home become theirs. *Thompson on Homesteads*, secs. 43, 102, 550; *Hicks v. Pepper*, 57 Tenn. 42; *Shepherd v. Brewer*, 65 Ill. 383; *Dawson v. Holt*, 44 Tex. 174; *Johnson v. Taylor*, 43 Tex. 121; *Davis v. Andrew*, 30 Vt. 678; *Nevin's Appeal*, 47 Pa. St. 230. (6) Where the homestead right exists, the property is subject to execution and partition and sale subject to that right. R. S., secs. 3341, 3342; *Poland v. Vesper*, 67 Mo. 727; *Le Bourgeoise v. McNamara*, 10 Mo. App. 116; *Harvey v. Duncan* (M. S.) Tenn. 1876; *Avans v. Everett*, 3 Lea (67 Tenn.) 76; *O'Gallon v. Tolley* (Kansas) 10 C. L. J. 57; *Hillard v. Scoville*, 52 Ill. 449; *Cook v. Webb*, 19 Minn. 170; *Blakely v. Colder*, 15 N. Y. 623. (7) The homestead right does not exist where the occupant has on y an individual interest as tenant in common with others. *Avans v. Everett*, 3 Lea, (67 Tenn.) 76.

W. C. Marshall for respondent.

(1) The property in suit, being a homestead, could not be legally mortgaged by the widow. *Whittle v. Samuels*, 54 Ga. 548; *Thompson on Homesteads*, secs. 548, 549. (2) The homestead is not subject to partition at this time. *Skouten v. Wood*, 57 Mo. 382. (3) Whether deceased left debts or not does not affect the homestead rights of the widow and minor children. (4) Partition affects possession only, and since the minor is entitled to the joint right of possession of the whole homestead there can be no such thing as partitioning that possession or the estate subject to that right. (5) The minor's homestead right is not affected by the widow's temporarily renting the homestead. *Skouten v. Wood*, 57 Mo.

Rhorer v. Brockhage.

380. The minor, not being *sui juris*, is incapable of abandoning the homestead.

HENRY, C. J.—John Brockhage, the father of defendant, died May 17, 1875, occupying as a homestead, and seized of the premises in controversy, leaving his widow and this defendant, a minor son, as his only heirs. After his death, the widow elected to take a child's part of his estate, in lieu of dower. Prior to 1878, she intermarried with one Alvord, and, on the twenty-eighth day of August, 1878, she and her husband mortgaged her interest in said property, and plaintiff claims under that mortgage. In November, 1879, Mrs. Alvord leased the homestead to another, and temporarily resided on other property which belonged to the estate of her deceased husband. The premises in question do not exceed in area, or value, the limits prescribed for a homestead. The object of this proceeding is to have partition of said premises betwixt the plaintiff and defendant. Defendant had a judgment in the circuit court, which was affirmed by the St. Louis court of appeals, and plaintiff has appealed to this court.

Whether the widow had an estate in the premises which she could convey to another, or what, if any, interest her grantee would take under a deed from her, purporting to convey a fee-simple title to an undivided half thereof, we deem it unnecessary to decide, being of the opinion that, even if, under her election, she was entitled to an undivided half of the premises in fee, there can be no partition thereof, until the defendant shall have attained his majority. The statute, section 2693, provides that the homestead shall vest in the widow and children, and shall continue for their benefit, until the youngest child shall have attained its legal majority. It is for their joint benefit, and there is nothing in the statute which confers upon her or warrants a fair inference that the widow has the right to dispose of it,

Rhorer v. Brockhage.

abandon, or otherwise deal with it to the impairment of the right of the children to occupy it as a homestead. *Kochling v. Daniel*, 82 Mo. 54.

It is contended that Brockhage owing no debts when he died, there can be no statutory homestead. The contrary was held in *Freund v. McCall*, 73 Mo. 346; but because, under our original homestead act, the widow took a fee-simple estate in the homestead, and not under the present law, which, it is claimed, is only an act exempting a homestead from the debts of the decedent, it is insisted that where there are no debts there can be no homestead. There was no material change effected by the act of 1875, bearing upon this question, except as to the estate of the widow in the homestead. That was, equally with the present law, an exemption act. The first paragraph of the first section of that act was precisely the same as that of the first section of the present law. The second section of that act, as does the second of the act now in force, prescribes what shall be done when an execution is levied. The subsequent sections of the two acts are not materially different from each other, and we see no reason for holding, under the present law, that there can be no statutory homestead, when the decedent left no debts, which did not bear with equal force on that question under the former law.

Nor do we think that the homestead right of the children can be, in any manner, affected by its abandonment by the mother. They may accompany her to another home, but their right in the old homestead continues.

The judgment is affirmed. All concur.

Anderson v. Griffith.

ANDERSON *et al.*, Appellants, v. GRIFFITH.

Practice in Supreme Court: WEIGHT OF EVIDENCE. The Supreme Court will not pass upon the weight of the evidence, nor determine its credibility and value where it is conflicting, but will defer to the conclusions and findings of the trial court having the witnesses before it.

Appeal from Adair Circuit Court.—HON. ANDREW ELLISON, Judge.

AFFIRMED.

U. S. Hall for appellants.

McQuoid & Clancy for respondent.

RAY, J.—This case has been in this court once before, and is reported in 66 Mo. 44, to which reference is here made. The judgment obtained by plaintiff was then reversed and cause remanded, and thereafter the venue was changed to the Adair circuit court. An amended petition was filed in the cause and upon second trial thereof, in the circuit court, there was a finding and judgment for the defendant, from which the plaintiffs have appealed. There is no point made upon the pleadings and it is unnecessary to set them out.

The evidence shows, without a conflict therein, that at the time of the land trade in March, 1866, set out in 66 Mo. 44, the entire proceeds of the Griffith farm in Marion county, to-wit: eight hundred dollars in cash, and Pasley's two notes of five hundred dollars each, were turned over to the plaintiffs, said notes being then made payable to the plaintiffs, with the agreement then made between the parties, that Pasley should secure the payment thereof by a mortgage to be taken in plaintiffs'

Anderson v. Griffith.

name on the Griffith farm in Marion county. Pasley, however, did not then make or deliver said mortgage, nor make or deliver the same in a few days thereafter, as he at the time agreed to do, and did not execute and deliver said mortgage until April, 1867, or about one year thereafter.

The evidence is conflicting as to whether the Pasley notes of five hundred dollars each and the mortgage on the Marion county farm, to secure the same, were to be received and accepted by plaintiffs as a payment of one thousand dollars by Griffith on the Anderson farm in Shelby county, or whether they were to be taken by them as payment conditional, on collection. Defendant Griffith, in April, 1867, procured Pasley and wife to make and execute said mortgage on the Marion county farm to plaintiff, paying Pasley therefor one hundred dollars (which amount Pasley claimed to be damaged on account of misrepresentation made by Griffith as to the lines and amount of land in cultivation), but the evidence is conflicting, whether Griffith was then led and induced to procure the mortgage from Pasley at the instance, advice, and direction of the plaintiff, E. M. Randolph, and upon a proposition from him, to the effect that if he, Griffith, would procure Pasley to make said mortgage to secure his two five hundred dollar notes, as Pasley had agreed to do, and would pay his own two notes for two hundred dollars each, he would let him out and release him from all liability on account of the land trade. The evidence shows that defendant Griffith had paid off both of his said notes for two hundred dollars prior to the date of this suit. Upon the issues of fact, as to which the evidence was, as we have said, conflicting, the finding of the court, as shown by its judgment in the record, was in the defendant's favor, and that plaintiffs were not entitled to any vendor's lien or other judgment in the cause, as claimed in their petition.

When there is a conflict in the evidence, which, as

The State ex rel. Phelan v. Engelmann.

in this case, is marked, the trial courts have the advantage of the presence of the witnesses in person, testifying in open court, and are better able to determine the credibility, value, and weight of their testimony. We are, therefore, accustomed, ordinarily, to defer to their conclusions and findings, and in this case, we find nothing in the record calling for a departure from our settled rule and custom in this particular.

Finding, therefore, no error in the action of the trial court, calling for our interference, its judgment is, therefore, affirmed, in which all concur.

THE STATE *ex rel.* PHELAN, *Assignee*, v. ENGELMANN.

1. **Jurisdiction: EQUITY: POWER TO SET ASIDE JUDGMENT.** The circuit court, being a court of original chancery powers in this state, has jurisdiction to enjoin the issuance of execution upon a judgment procured by fraud in the court of common pleas, notwithstanding such judgment has been affirmed by the Supreme Court.
2. ———: **MANDAMUS.** Where the circuit court has jurisdiction, such jurisdiction cannot be questioned or controlled by mandamus, however erroneously it may be exercised.

Mandamus.

WRIT DENIED.

The following is the return to the alternative writ of mandamus in this case:

“The said respondent comes now, and for return to the alternative writ of mandamus herein admits the institution of the suit by A. J. P. Garesche against the president, directors and faculty of St. Vincent’s College, and the recovery by said plaintiff of the verdict

The State ex rel. Phelan v. Engelmann.

and judgment on June 9, 1877, the taking of an appeal by the defendant to this court, the reversal of said judgment, the granting of the motion for a re-hearing, and the affirmance of said judgment as stated in said alternative writ. And the said respondent states that he cannot issue the writ of execution demanded by the relator because he stands enjoined from doing so by a decree rendered and writ of injunction issued by the circuit court of Cape Girardeau county, a court of general and competent jurisdiction, rendered after due notice to and hearing of all the parties thereto, all of which will fully appear from a transcript of said proceedings herewith filed and made a part hereof.

“The respondent states that the alternative writ correctly sets forth the petition for said decree, and he admits that the relator appeared in said circuit court in answer to said suit in equity, and contested the same, and alleges that after the rendition of final judgment against him, applied for, and was granted, an appeal to this court, where the said cause is now pending.

“And respondent denies that any plea of *res adjudicata* which may have been filed by the relator in said cause was sustained by proof, or that all or any of the matters or things alleged in said bill as grounds for the relief therein sought, were, or could have been, passed upon, or in any otherwise adjudicated by this court on the re-hearing of said appeal, or at any other time, but the respondent avers that the files of this court will, and do, show that in the original abstract of the record prepared by the attorneys for the appellant in said cause, the instructions above referred to were stated to have been given only on behalf of the respondent therein, and that no exception was taken to said abstract in this respect, but its correctness admitted, and that upon a submission of said cause the judgment therein was, by this court, on December 20, 1880, reversed, and the said cause remanded, and that on December 29, 1880, the re-

The State ex rel. Phelan v. Engelmann.

spondent therein filed a motion for a re-hearing, alleging that the original transcript in said cause showed that the instructions, because of the giving of which on behalf of said respondent, this court had reversed the judgment, had also been given on behalf of the appellant, which motion was by the court on January 7, 1881, sustained. That on April 19, 1881, the said appellant filed in this court an application alleging that the instructions had not in fact been given on behalf of said appellant, but only on behalf of the respondent, Garesche, and that the transcript erroneously showed that they had been given for said appellant, and supported the same by affidavits fully showing the facts and the cause of the mistake, and asking for a writ of *certiorari* to bring to this court a correct transcript; that said application was by this court granted, and a *certiorari* issued on April 29, 1881; that in response to said writ a transcript was filed in this court which showed, first, the instructions given for said defendant; next, the modification of two instructions asked by it by the court, and their giving by the court, as modified, and exceptions to the action of the court in so modifying said instructions, and then, under the caption, 'erroneous instructions,' were inserted the two instructions in controversy, and the endorsement thereon by the judge of the court which tried the case, as follows: 'The above endorsement, to-wit: "Defendant's instructions," written in pencil, appears to be in my hand writing, and is simply a clerical error made by me. This instruction was given for the plaintiff, and not for the defendant. The same theory is embraced at the close of instruction number nine for defendant, but it was added by the court, and not given at defendant's instance or request' (page 199); that on May 22, 1882, the said respondent asked this court for a *certiorari* asking, among other things, that a transcript be sent to this court, omitting therefrom the above endorsement of said judge; that the said appellant resisted said application and

The State ex rel. Phelan v. Engelmann.

insisted that the amended transcript was perfect and should be taken as true by this court, and that June 29, 1882, this court made the following indorsement upon the said respondent's application for a *certiorari*: 'It appearing, from the transcript filed in obedience to the writ of *certiorari*, that there is no error in the original transcript as to the instructions upon which the re-hearing was granted, the cause will be set down for hearing on the October term on the original transcript.' And this respondent avers that said affirmance was had solely and alone upon said original transcript, and that there was not in fact in anywise an adjudication by this court upon the question of said error and mistake in said original transcript; that said action was at law pending in this court on appeal, and of which this court only had appellate and not original jurisdiction; that relief could only be had by the appellant against and from the result of such mistake by a proper suit in a court of equity, and that no original equitable jurisdiction could be conferred upon this court by any motion or suggestion of any party to an action at law pending before it on appeal; that the appellant in said cause fully showed to this court all the facts of said error and mistake, not in contradiction of the transcript, but in support of its application for a *certiorari*, and as corroborative of the endorsement of said judge upon said erroneous instructions, but that this court held that such matter could not be investigated before it in said cause, but that it would, and did, in fact, decide said cause upon said original transcript, and upon it alone; that thereafter the appellant in said cause filed its bill in equity in the circuit court of Cape Girardeau county, a court of general and competent jurisdiction, a copy of which bill is inserted in said alternative writ, and that upon a hearing of said cause, the facts therein stated being fully proved, the said court gave judgment and rendered a decree, among other things, perpetually enjoining this defendant from issuing

The State ex rel. Phelan v. Engelmann.

an execution upon the judgment in favor of said Garesche against said St. Vincent's College, and setting the same aside; that a writ of injunction has been accordingly served upon this respondent, and under it he stands enjoined by a court of competent jurisdiction from issuing said execution, and should he do so he is in danger of being held liable for damages, and to arrest for violating its decree and writ, and that said judgment has been set aside by a decree of a court of competent jurisdiction, which latter decree remains in full force and unreversed, and the same is now pending in the court by appeal therefrom by this relator, and beyond the jurisdiction of said circuit court, and until reversed it is binding upon all the parties thereto, and especially this relator and respondent; that the real party in interest in this proceeding and in maintaining the correctness of said decree, to-wit: the president, directors and faculty of St. Vincent's College is not a party to this proceeding and not before the court, and that it has a right to be heard, and that as the judgment upon which this relator demands a writ of execution to be levied upon the property, real and personal, of said president, directors and faculty of St. Vincent's College, has been set aside, annulled, and the enforcement thereof enjoined by the decree and judgment of a court of competent jurisdiction, which latter decree and judgment remains in full force and effect, the issuing of said execution by this respondent, and its enforcement against and sale of the property of the said president, directors and faculty of St. Vincent's College thereunder, would be a saving of the said property of the president, directors and faculty of St. Vincent's College without due process of law, in violation of the provisions of section one of the fourth amendment to the constitution of the United States, and of section thirty of article two of the constitution of this state.

"Wherefore, by reason of the facts of this case, this respondent says he ought not to be compelled by a writ

The State ex rel. Phelan v. Engelmann.

of mandamus to issue the writ of execution demanded by the relator, contrary to said decree and writ of injunction of said circuit court. And having fully answered, he asks to be discharged with his costs."

The following is the motion by relator for a peremptory writ of mandamus upon respondent's return:

"Now comes the relator herein, and moves the court for a peremptory writ of mandamus on the return of the respondent herein to the alternative writ of mandamus, on the following grounds, to-wit: (1) Said return does not show cause why the peremptory writ should not issue. (2) Said return shows affirmatively on its face that this court on June 29, 1882, ruled and held that there was no error in the original transcript in the case of A. J. P. Garesche against the president, directors and faculty of St. Vincent's College, and that a re-hearing was granted in said case and had on said original transcript, notwithstanding the application by said college for a writ of *certiorari* to bring to this court a correct transcript, notwithstanding the issuance of such writ, and notwithstanding the filing in this court of a transcript in response to said writ. (3) Said return shows on its face that all the grounds relied on in the bill in equity brought by said college in the circuit court of Cape Girardeau county against this relator were before this court, and were determined and adjudicated by this court against said college, prior to the filing of said bill in equity. (4) The injunction issued by said circuit court against respondent herein, mentioned and described in said return, directed the respondent herein not to issue execution against said college, when at the date of said injunction said respondent had been theretofore directed by the mandate of this court to carry out the judgment of this court affirming the judgment of the Cape Girardeau court of common pleas in said case of said Garesche against said college. (5) Said return shows that respondent herein refuses to

The State ex rel. Phelan v. Engelmann.

obey the mandate of this court, because an inferior court has enjoined him from obeying such mandate. (6) The injunction issued by said circuit court against respondent herein, was without authority and is void, it being an attempt to nullify the process of this court, and to review and reverse the solemn judgment of this court. (7) Said return is in other respects vague, indefinite, and insufficient, and is not fully responsive to the allegations in said alternative writ contained."

Walker & Walker for relator.

The circuit court had no jurisdiction in this matter. Its decree was an absolute nullity. "A failure of justice through the error of the judge, the incompetency of the jury, or the omission of the party to present his case in a proper manner, does not warrant the intervention of a chancellor." *White & Tudor's Leading Cases in Equity*, vol. II., part 2, p. 1328; *Holmes v. Statler*, 57 Ill. 209; *McClure v. Miller*, 1 Bailey's Eq. 107; *Foster v. Wood*, 6 Johnson's Ch. 89; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332; *Wilsey v. Maynard*, 21 Ia. 107; *Nicholson v. Patterson*, 6 Humph. 394; *Smith v. Allen*, 63 Ill. 474.

J. B. Dennis also for relator.

(1) *Madamus* will issue from this court where the court below neglects or refuses to discharge its duty. *State ex rel. v. Cape Girardeau Court Common Pleas*, 73 Mo. 560; *State ex rel. Harris v. Laughlin*, 75 Mo. 366. Or to compel the performance of a ministerial duty. *State, etc., v. Garesche*, 65 Mo. 480. (2) The facts stated in the petition of relator warrant the issuance of a mandamus. High on Ex. Leg. Rem., sec. 17; *Etheridge v. Hull*, 7 Port. 47; *In re Trustees*, 1 Barb. 34; *Fremont v. Crippen*, 10 Cal. 211; *King v. Bank*, Douglas, 520. Mandamus is asked to a court in which no proceeding

The State ex rel. Phelan v. Engelmann.

has been had from which an appeal would lie, and this court is asked to compel respondent to do his duty, which relator has a legal right to have done. *State v. Dougherty*, 45 Mo. 294; *State v. Lafayette Circuit Court*, 41 Mo. 22; *Williams v. Court*, 27 Mo. 225. (3) Equity will not enjoin, unless there is an allegation and proof of injustice; and this injustice can only be shown by stating a defence which the court may see is a valid one. *Sauer v. City of Kansas*, 69 Mo. 47; *Matson v. Field*, 10 Mo. 100; High on Inj. (2 Ed.) sec. 179. (4) The facts stated in the petition show no fraud on the part of Mr. Garsche. Story's Eq. Juris. (11 Ed.) sec. 205. (5) Judgments of courts of last resort are revisable only by themselves. Story's Eq. Juris. (11 Ed.) sec. 1580; *Roushell v. Maxwell*, Hemp. 25; *McCrimmon v. Cooper*, 37 Tex. 423.

Louis Houck and *R. H. Whitelaw* for respondent.

(1) A judgment of an inferior court may be set aside in equity for fraud. Freeman on Judgments (1 Ed.) sec. 486. When a judgment has been obtained by fraud, jurisdiction will be entertained. *Miles v. Jones*, 28 Mo. 89; *Marx v. Fore*, 51 Mo. 74; *Harris v. Sanders*, 38 Mo. 422; *Ritter v. Press Ass'n*, 68 Mo. 458; *Carolus v. Koch*, 72 Mo. 646; *Smith v. Sims*, 77 Mo. 273; *Duncan v. Lyon*, 3 Johns. Ch. 365. (2) A court of equity will set aside a judgment of an inferior court, although affirmed by the Supreme Court for fraud, accident, or mistake. *Kohn v. Lovett*, 43 Ga. 179; *Wilson v. Montgomery*, 14 S. & M. 205. (3) The rule is that in equity the judgments of high, as well as inferior courts, may be assailed. Kerr on Fraud and Mistake, 293; *Boulton v. Scott*, 2 Green's Ch. 231, *et seq.*; 20 How. St. Tr. 544. (4) In this state original equitable jurisdiction is vested in the circuit courts, and errors committed in the exercise of this jurisdiction must be corrected by

The State ex rel. Phelan v. Engelmann.

writ of error or appeal. (5) Mandamus will not lie where the party aggrieved has another adequate remedy. High on Ex. Leg. Rem., sec. 15; *Ex parte Ry. Co.*, 65 Ala. 599; 62 Ala. 252. Where an express remedy is afforded by statute for the redress of a grievance, mandamus will not lie. High on Ex. Leg. Rem., secs. 16, 177-180, and cases cited; *State v. Howard County Court*, 39 Mo. 375; *State v. McAuliff*, 48 Mo. 112; 73 Mo. 101; 40 Mich. 63.

D. L. Hawkins and *Smith & Krauthoff* also for respondent.

The alternative writ does not show a state of facts which entitles the relator to the relief prayed for. 2 Story's Eq. Jur. (12 Ed.) secs. 1570, *et seq.*; 2 Dan. Chy. Pr. (5 Ed.) sec. *1624; 3 Pom. Eq. Jur., sec. 1364. "The object of the injunction is to prevent the person against whom it issues from availing himself of an unfair advantage, resulting from fraud, accident or mistake, or otherwise, the enforcement of which is against conscience." 1 High on Inj. (2 Ed.) secs. 113, 114; Freeman on Judgments (3 Ed.) sec. 500 *a*, and note; *Little v. Price*, 1 Madd. Chy. 183; *Pearce v. Olney*, 20 Conn. 544-554; *Stanton v. Embry*, 46 Conn. 595; *Dobson v. Pearce*, 12 N. Y. 156-165; *Webster v. Skipwith*, 26 Miss. 341-348; *Kohn v. Lovett*, 43 Ga. 179, 181; Kerr on Fraud and Mistake, 293; *Boulton v. Scott*, 2 Green's Ch. 231, *et seq.* Where full and ample relief can be had by appeal, writ of error, or otherwise, courts will not, and should not, permit the functions of these every day remedies to be usurped by mandamus. *Ex parte Ry. Co.*, 65 Ala. 599. Nor will it lie to correct an error in the final judgment or decree of an inferior court. *Ex parte Schmidt*, 62 Ala. 252. Nor to compel an inferior court to enter a given judgment. *State v. District Court*, 32 La. Ann. 1306; *Ex parte French*, 100 U. S. 1. "An inferior court cannot be compelled to reverse a decision it has made in

The State ex rel. Phelan v. Engelmann.

the exercise of its legitimate jurisdiction. That is the office of a writ of error, or an appeal, but not of a writ of mandamus." *Ex parte Flippin*, 94 U. S. 348; *Ex parte Loring*, 94 U. S. 418; *Ex parte Perry*, 102 U. S. 183-186. And the case is not changed because the appropriate remedy may involve an inconvenient delay. *Ex parte Perry*, 102 U. S. 183-186. The remedy by mandamus is an extraordinary one, and in no case will it be allowed unless the party has no other legal remedy. The absence of this other remedy is not alleged in the petition in this case, and there can be no pretense that the relator cannot obtain full and adequate relief against any error committed by the circuit court by an appeal to this court. High on Ex. Leg. Rem., secs. 15, 177-180, and cases cited; *State v. Howard County Court*, 39 Mo. 375; *State v. McAuliff*, 48 Mo. 112; *Mansfield v. Fuller*, 50 Mo. 338; *Potter v. Todd*, 73 Mo. 101.

SHERWOOD, J.—This is an original proceeding in this court, having for its object the issuance of a peremptory writ of mandamus to compel respondent, who is the clerk of the common pleas court of Cape Girardeau, to issue execution on a judgment formerly obtained in that court by Alex. J. P. Garesche against the president, directors and faculty of St. Vincent's College, afterwards affirmed in this court (76 Mo. 332), and which judgment, prior to such affirmance, had been assigned by Garesche to relator. After such affirmance, the defendants in that cause, by petition, in the nature of a bill in equity, filed in the Cape Girardeau circuit court, charging fraud on the part of Garesche in procuring, on re-hearing, an affirmance of the judgment, which, at first, had been reversed, obtained, on final hearing in the circuit court, a decree granting a new trial in the cause, in accordance with the opinion of this court as first delivered, and perpetually enjoining and restraining relator and Engelmann, who were parties defendant in the circuit court, from

The State ex rel. Phelan v. Engelmann.

issuing execution on the judgment of the common pleas court. From this decree relator has appealed, and his appeal is now pending in this court. These, in brief, are the facts presented in this case, and upon which relator, denying the sufficiency of respondent's return, but admitting, by his motion, the truth of its recitals, asks that a peremptory writ issue.

I. Mandamus is not the proper remedy in this case. It is among the fundamentals of the law relating to the issuance of such a writ that it will not be awarded but as an extraordinary remedy, only issuing when the law, in the ordinary methods of its procedure, is powerless to grant relief. It results from this principle that relief will not be granted an aggrieved party in this unusual way, where he may attain the same result by invoking another adequate legal remedy. In all such cases the courts uniformly refuse to exercise their extraordinary jurisdiction in behalf of a party who, in such a situation, seeks it. To rule otherwise than this, would be to allow a writ of mandamus to usurp the functions of an appeal or writ of error. "Indeed, the interference in such cases would, if tolerated, speedily absorb the entire time of appellate tribunals in revising and superintending the proceedings of inferior courts, and the embarrassment and delay of litigation would soon become insupportable, were the jurisdiction by mandamus sustained in cases properly falling within the appellate powers of the higher courts." High on Ex. Leg. Rem., secs. 15, 177, 180, and cases cited; *Blecker v. St. Louis, etc.*, 30 Mo. 111; *Potter v. Todd*, 73 Mo. 101; *Williams v. Judge, etc.*, 27 Mo. 225; *State v. Howard County Court*, 39 Mo. 375; *State ex rel. v. McAuliff*, 48 Mo. 112; *Mansfield v. Fuller*, 50 Mo. 338; *State ex rel., etc., v. Lubke*, 85 Mo. 338. And the principle announced in respect to refusing the writ of mandamus is not affected, nor the case changed because the appropriate remedy may in-

The State ex rel. Phelan v. Engelmann.

volve inconvenient delay, or operate harshly or oppressively on the party complaining, or by reason of the fact that the judgment of the subordinate court is plainly erroneous, if the question passed upon by such court was properly within its jurisdictional powers. High on Ex. Leg. Rem., sec. 189; *Ex parte Perry*, 102 U. S. 183.

But it is insisted that the circuit court of Cape Girardeau county had no jurisdiction in the premises, and that, to correct the assumption on the part of that court of an unwarranted jurisdiction, a peremptory writ should issue. The doctrine is a familiar one that equity will interfere where a judgment is obtained or entered at law, through fraud, accident or mistake, and by all appropriate means will protect the rights and interests of the party who would otherwise be injudiciously affected thereby. This equitable interference manifests and enforces itself in an almost infinite variety of ways. One of the most common methods of procedure is by enjoining the inequitable judgment; another, by setting it aside. 3 Pom. Eq. Jur., sec. 1364; 2 *Ib.*, secs. 836, 871; 1 Story's Eq. Jur., sec. 252 *a*; 2 *Ib.*, sec. 876 *a*; 2 Dan. Ch. Pr. 1624. But a court of equity, in granting injunctive relief, does not act upon the courts whose judgments it enjoins, nor claim any supervisory power over such courts or their proceedings. It acts solely on the party. Its writ of injunction is not even addressed to those courts. It neither assumes any superiority over those courts, nor denies their jurisdiction. It grants its restraining orders, which are directed only to the parties, on the sole ground that from certain equitable circumstances, of which the court of equity has cognizance, it is against conscience that the party inhibited should be allowed to enforce his claim or judgment. 2 Story's Eq. Jur., secs. 875, 1571. The action of a court of equity, in such circumstances, is very succinctly stated in the case of *Wingate v. Hayward*, 40 N. H. 437, where it is remarked by the court that, "if, however, the judgment of a court of common

The State ex rel. Phelan v. Engelmann.

law having general jurisdiction, be rendered by accident or mistake, or through fraud, or any fact exists which proves it to be against conscience to execute the judgment, of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud, accident, or mistake, unmixed with any fault or negligence of himself, or his agents, a court of equity may interfere by temporary or perpetual injunction, to restrain the adverse party from availing himself of such a judgment. Fraud will vitiate a judgment, and a court of equity may declare it a nullity. Equity has so great an abhorrence of fraud that it will set aside its own decrees if founded thereupon.

And, "where the judgment has been procured by artifice or concealment, on the part of the plaintiff, and the court where the fraud has been perpetrated is not able to afford adequate relief, then a court of equity will take hold of the party who has committed the fraud, and will prevent his using the judgment to the injury of his adversary." *Tompkins v. Tompkins*, 3 Stock. (N. J. Eq.) 512-514. Mr. Kerr says: "In applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior, or by the highest, court of judicature in the realm, but in all cases alike, it is competent for every court, whether superior or inferior, to treat as a nullity any judgment which can be shown to have been obtained by manifest fraud." Kerr on F. and M. 294. In *Boulton v. Scott*, 2 Green's Ch. 231, it is declared that the jurisdiction of a court of equity to set aside a judgment for fraud extends to *all* courts, the *grade or character of the court* making no difference. In the case of *Wilson v. Montgomery*, 14 Smedes & Marshall, 205, the court say, that where a judgment is obtained in the lower court by a false return, and *affirmed in the Supreme Court*, the affirmance in the Supreme Court *will not make any difference in the result*. And,

The State ex rel. Phelan v. Engelmann.

further, that "any other rule would destroy all confidence in judicial proceedings." A ruling analogous to this was made in Georgia, where, owing to the fact that the certificate of the trial judge to the bill of exceptions was by mistake improperly *dated*, in consequence of which the bill of exceptions was dismissed in the Supreme Court, and the judgment, in consequence of such dismissal, affirmed, it was held that equity, as administered by one of the circuit courts of that state, would enjoin the collection of the judgment thus affirmed. *Kohn v. Lovett*, 43 Ga. 179.

I have cited the authorities on the question of fraud, etc., and of the jurisdiction which courts of equity take in such cases, even when the claim ripens into judgment, and into the affirmance of that judgment, by the *highest appellate court*, merely to show that the circuit court, in the present instance, which, generally speaking, is the only tribunal which is possessor of original chancery powers in this state, had the power to take cognizance of the matters stated in the petition for equitable relief filed in the circuit court by the president and directors of St. Vincent's College. Of the sufficiency of that petition I do not purpose to speak, nor of the nature and propriety of the decree rendered thereon; for if the jurisdiction of the circuit court be conceded, such jurisdiction, however erroneously exercised that jurisdiction may be, cannot be questioned or controlled by mandamus. High on Ex. Leg. Rem., sec. 189. Nor can the circuit court, by entertaining jurisdiction in this instance and proceeding to a final decree, be regarded as wanting in proper respect for the judgment of this court. Its action, in this regard, only goes so far as this: That an unconscionable advantage has been gained in the original action, by the plaintiff, which a court of equity will not permit his assignee to retain, and which advan-

Wernse v. McPike.

tage no powers but the flexible powers of a court of equity are able to wrest from his hands.

The peremptory writ will, therefore, be denied. All concur.

WERNSE *et al.*, *Plaintiffs in Error*, v. McPIKE.

Administration: NOTICE OF EXHIBITION OF DEMAND: LIMITATION,

While the service of process in a suit against an administrator, instituted in a circuit court having no jurisdiction, cannot be regarded as a valid notice to the administrator of the exhibition of the demand sued on, and while a judgment of said court and a classification of the same in the probate court are nullities, still if the demandant acted in good faith and the validity of the judgment was recognized for a long time by both parties, and until the invalidity of the judgment, at the instance of the administrator, was established by judicial action, then, in such case, a new notice of the presentation of the demand in the probate court will be regarded as an amendment by the substitution of the note as the basis of the demand, instead of the circuit court judgment and the administrator will not be permitted to interpose the statutory bars, and this, although the notice of the exhibition of the demand was given, and the presentation of the latter for allowance was made some five years subsequent to the granting of the administration letters.

Error to Ralls Circuit Court.—HON. THEODORE BRACE,
Judge.

REVERSED.

Broadhead & Hauessler and W. H. Biggs for
plaintiffs in error.

(1) The claimants having been misled by the action of the Ralls probate court in classing the judgment of the St. Louis circuit court, on personal appearance of admin-

Wernse v. McPike.

istrator, their claim was not, under those circumstances, barred against the estate for want of presentment of original note within the two years. *Fenn v. Dugdale*, 31 Mo. 580; *Tevis v. Tevis*, 23 Mo. 256; *Williamson v. Anthony*, 47 Mo. 299; *Pfeiffer v. Suess*, 73 Mo. 248; *Boone v. Shackelford*, 66 Mo. 493; *North v. Walker*, 66 Mo. 453. (2) The claimants, by reason of the error of the court allowing and classing the judgment, instead of the original demand, and the administrator being at the time personally present, and making no objection until two years had elapsed, cannot now prevent the claimants from having the original note allowed and sharing in the distribution of the estate. (3) The administrator, having had notice of claimants' demand within the two years fixed by law, both by service of writ and petition in the St. Louis circuit court, as well as personally appearing in the probate court when demand was presented for allowance and classified, is estopped from now being permitted to plead limitations, and thus by a technicality defeat the plaintiff's demand from any participation in the estate.

Smith & Krauthoff, W. P. Harrison and J. P. Wood for defendants in error.

(1) The serving of process in the St. Louis circuit court, which had no jurisdiction, cannot be regarded as a valid notice to the administrator of the exhibition of the demand sued on in this case. *Wernse v. McPike*, 76 Mo. 249; *Wernse v. Hall*, 101 Ill. 423. Even if legal notice had been given to the administrator, or he had waived the same, still an allowance of the claim was barred at the time of its presentation for that purpose on May 2, 1879. (2) Plaintiffs could only exhibit their claim against said estate in the manner indicated by the statute, and this they have wholly failed to do. *Pfeiffer v. Suess*, 73 Mo. 245, 254; *Burton v. Rutherford*, 49 Mo.

Wernse v. McPike.

258; *Richardson v. Harrison*, 36 Mo. 96; *Bryan v. Mundy*, 14 Mo. 458. (3) This is not a proceeding in equity, but it is an action at law to recover a judgment. Allowances are in effect judgments at law. *Smith v. Sims*, 77 Mo. 269. This is not an action for equitable relief on the ground of fraud, deceit or mistake, and the principles of equity jurisprudence applicable to such cases cannot be invoked here. (4) The classification of the void judgment was a nullity for want of jurisdiction in the probate court. The action of the parties and the probate court in respect to such classification stands as if it had never taken place. 9 Mo. 259; 55 Mo. 363; 4 Mo. App. 541; 58 Mo. 90. (5) The void character of the entry of March, 1874, is *res adjudicata*. 68 Mo. 546, 551; 75 Mo. 282, 283; 76 Mo. 38, 50, 51; 62 Mo. 338, 339. The case is precisely the same as when here before.

NORTON, J.—It appears from the record in this case that Abraham McPike was the endorser on a note for three thousand dollars, dated the twenty-third of December, 1872; that he died before the maturity of the note, and letters of administration were granted on his estate to defendant, H. C. McPike, on the twenty-eighth day of January, 1873, by the probate court of Ralls county; that payment of said note was, at its maturity, demanded, which being refused, it was duly protested, of which the defendant as administrator was duly notified; that thereafter suit was instituted in the circuit court of St. Louis county on said note against said defendant as said administrator, and all other parties thereto, of which said administrator had personal notice, by service upon him of a copy of the petition and note; that final judgment was afterwards rendered in said cause against all the parties; that thereafter, at the April term, 1874, of the probate court of Ralls county a copy of said judgment was presented for classification

Wernse v. McPike.

and was, without objection of defendant, placed in the fifth class of demands; that this was recognized and treated by defendant, as well as by plaintiff, as a proper exhibition and classification of said claim, till the twelfth day of December, 1877, when said probate court set aside and annulled the order classifying said demand, which action of said probate court was approved by the circuit court of Ralls county, in 1879, and which action of the circuit court was affirmed by this court in the case of *Wernse v. McPike*, 76 Mo. 249, at its October term, 1882, on the ground that the circuit court of St. Louis county had no jurisdiction of the cause of action, as against the administrator, in which the judgment was rendered.

It also appears that on the nineteenth day of March, 1879, plaintiffs gave defendant a written notice containing a copy of the said note, notifying him that on the second Monday of May, 1879, they would present the said note for allowance against the estate. The probate court held that the said claim was barred by limitation, and refused to allow it; which judgment, on appeal to the Ralls county circuit court, was affirmed, and it is from this judgment that plaintiffs prosecute their writ of error, and the sole question presented for determination is whether, under the facts and circumstances of this case, the administrator can interpose the statutory bar of limitation, and whether, in contemplation of law, the demand of plaintiffs was exhibited to the administrator within two years after letters were granted, and presented to the probate court for allowance within three years after grant of such letters.

The law in force at the time the proceedings were had in this case is to be found in sections two, five, six and fifteen, Wagner's Statutes, volume 1, pages 102, 104. Section two provides that all demands not exhibited within two years shall be barred. Section five provides that any person may exhibit his demand by serving the

Wernse v. McPike.

administrator with a written notice, stating the nature and amount of his claim, with a copy of the instrument of writing or account on which the claim is founded, and that such claim shall be deemed to be legally exhibited from the time of serving such notice. Section six provides that no person shall claim the benefit of section five unless he shall present his demand for allowance within three years after the granting of the first letters of the estate. Section fifteen provides the kind of notice to be given when a demand is to be presented for allowance. The liability of the estate for the payment of the demand in question is predicated on the fact that McPike, deceased, was the endorser on a note, of the protest of which for non-payment the defendant, as his administrator, was duly notified.

The facts disclosed by the record show that soon after the protest and within the first year of the administration, suit was instituted upon the note in the circuit court of St. Louis county, of which the administrator was notified, which terminated in a judgment against him; that this judgment was thereafter, in 1874, and within two years after the grant of letters, presented to the probate court of Ralls county for classification and put in the fifth class of demands. This judgment and classification was treated by the administrator and the plaintiffs as a valid proceeding, and was in good faith relied upon till in 1877, when plaintiffs instituted a proceeding in said probate court for its payment, the administrator appeared and resisted the payment on the ground that the judgment rendered by the circuit court of St. Louis county was void, because said court had no jurisdiction of it, and that the classification of such judgment was, therefore, a nullity. The point thus made was sustained by the probate court, and on appeal to the circuit court the action of the probate court was approved by the judgment of said circuit court rendered in 1879, which judgment on appeal to this court was affirmed at its Oc-

Wernse v. McPike.

tober term, 1882, on the ground that the judgment of the circuit court of St. Louis county was a nullity and that no right could be founded on it.

During these proceedings plaintiff filed in the probate court the following notice:

"To H. C. McPike, Administrator of Abraham McPike:

"Take notice that we are the owners and holders of a note, described in the words and figures as follows:

"ST. LOUIS, December 23, 1872.

"Sixty days after date we promise to pay to the order of A. McPike, three thousand dollars, for value received, payable at the Traders' Bank, St. Louis, with 10 per cent. interest per annum from maturity.

"LEIPER, BOWLING & COMPANY.

"Which note was endorsed by A. McPike and by Leiper, Bowling & Company, and was protested by Wm. Hammel, notary public, February 24, 1873, and which note was shown and exhibited to you prior to August, 1873, and which note was sued upon in the circuit court of St. Louis county, state of Missouri, on March 19, 1873, in favor of Traders' Bank, against the makers and yourself, as administrator of Abraham McPike, and a copy of the petition, containing a full description of said note, was served upon you, with a copy of writ, July 5, 1873, by sheriff of St. Louis county, Missouri, and in which case judgment was, subsequently, on October 16, 1873, by said court rendered against all the defendants; and which judgment was, subsequently, on April 15, 1874, duly presented to the Ralls county probate court, and then and there entered and allowed as a fifth-class demand against said Abraham McPike's estate, from which no appeal was ever taken, and which judgment has since been assigned to us and said note delivered to us, and we are now the legal holders and owners of said note and judgment in

Wernse v. McPike.

the circuit court of St. Louis county, and the classification by the probate court of Ralls county, we do hereby give you notice that we will, on second Monday of May, 1879, or as soon thereafter as we can be heard, present to the probate court of Ralls county, Missouri, the above described original note for allowance against the said estate of Abraham McPike.

"Yours,

"HERMAN A. HAEUSSLER,

"HENRY H. WERNSE."

In view of the facts disclosed by the record before us, viz. : that letters of administration were granted defendant on the twenty-eighth of February, 1873; that the note was protested, of which defendant was duly notified soon after he qualified as administrator; that defendant was served on the fifth of July, 1873, with a copy of the writ, petition and note in the action commenced on said note in the circuit court of St. Louis county; that judgment was rendered in said suit in October, 1873, which, on the fifteenth of October, 1874, with a full copy of the proceedings in said suit, including a copy of the note, with proper affidavit, was presented to the probate court in the presence of defendant, and put in the fifth class of demands; that such action of the court in classifying the demand was not questioned by the administrator till in 1877, when plaintiffs sought to enforce its payment, but on the contrary its validity was recognized by him, by his filing on the fourteenth day of November, 1875, in the probate court for an order for the sale of real estate to pay the debts against the estate, among which was included in his petition the judgment of plaintiffs as classified; and it was, also, further recognized by several letters of defendant in evidence written to one of plaintiffs between the thirtieth of June, 1876, and November, 1876, from which it appears that plaintiffs were urging payment, and defendant was asking in-

Wernse v. McPike.

dulgence and time, proposing to pay with the real estate which he had been authorized to sell privately, never calling in question the validity of the debt or the proceedings had to establish it. In view of these facts and the further fact that when, in 1877, the defendant for the first time, in resisting an order, applied for by plaintiffs, for the payment of their claim assailed the proceeding classifying it as invalid, and the further fact that during the pendency of the litigation growing out of this resistance and as soon as the judgment of the circuit court was rendered in 1879, pronouncing the action of the probate court, in classifying the judgment of the St. Louis circuit court invalid, plaintiffs at once gave the notice hereinbefore quoted. We feel justified in holding that it would be unjust, inequitable and contrary to the spirit of the administration law to allow the administrator to interpose the statutory bar, on the technical ground that the strict letter of the law was not pursued, although in spirit and essence it was complied with, and for this ruling precedents can be found in the cases of *North v. Walker*, 66 Mo. 453; *Tevie v. Tevie*, 23 Mo. 256; *Malloy v. Lawrence*, 31 Mo. 583; *Williamson v. Anthony*, 47 Mo. 299.

In the case last cited an administrator presented to the probate court a claim against the estate of which he was the administrator; the court passed upon it and allowed it against the estate without appointing a suitable person to appear and manage the defence, as the statute required. Four years afterwards the error in the allowance being discovered, the claim being again called up for allowance was rejected on the ground that it was barred by statute. This judgment of the probate court was reversed by this court, it being observed in the opinion: "The first proceeding, so far as the judgment was concerned, was clearly irregular, and perhaps void. But it does not necessarily follow that it will in no manner avail the plaintiff. It shows that he acted

Wernse v. McPike.

in good faith, that he brought his demand into court, and the vice of the judgment is less his fault than that of the court. * * * Admitting that the administrator, like others, is limited to two years to exhibit his demand, the only question is whether the original irregular proceedings amounted to such exhibition. We think in common justice it ought to be so considered. While men must be held responsible for their ignorance of the law, and will not be excused for disregarding its provisions, still their errors, when acting in good faith, will be viewed with liberality, and a substantial compliance be held sufficient." So in case of *Tevis v. Tevis, supra*, when a notice was given that a demand founded on an account would be presented for an allowance, it appearing in the case that the demand in fact was founded on a note and not an account, it was held that plaintiff could amend his notice, and the judgment was reversed and cause remanded in order that he might do so.

Under this ruling the notice given in March, 1879, during the pendency of the litigation growing out of the proceedings had in the probate court in 1874, may be regarded as an amendment by the substitution of the note as the basis of the demand, instead of the judgment rendered upon it by the St. Louis county circuit court. So in the case of *North v. Walker, supra*, while the statute was not in strict letter complied with, it was held that the statutory bar would not apply, inasmuch as in substance and spirit it had been complied with.

Judgment reversed and cause remanded, to be proceeded with in conformity to this opinion. All concur.

Drain v. The St. Louis, Iron Mountain & Southern Ry. Co.

**DRAIN, Appellant, v. THE ST. LOUIS, IRON MOUNTAIN
& SOUTHERN RAILWAY COMPANY.**

1. **Contributory Negligence: DEMURRER TO EVIDENCE.** The evidence of the plaintiff in this case, which was an action for injuries received from defendant's train, in attempting to cross a street in the city of St. Louis, *held*, not to warrant a demurrer to the evidence for defendant, on the ground that it showed that plaintiff had failed to look or listen before attempting to cross the track.
2. ——— : ———. Where the evidence of plaintiff, relied on to show that he was guilty of contributory negligence, is vague, ambiguous, and uncertain, and does not clearly, or conclusively show such negligence on his part, the case should not be taken from the jury.
3. **Personal Injuries: DAMAGES.** A verdict for \$6,500 for personal injuries, held not excessive in this case.

Appeal from St. Louis Court of Appeals.

REVERSED.

The following were the instructions given for the plaintiff:

"1. The court instructs the jury that, although they believe from the evidence that plaintiff was guilty of some negligence, or imprudence, which contributed remotely to the injuries complained of, yet if the defendant, its agents, or employes, were guilty of misconduct, or carelessness, in the management of the defendant's car, which misconduct, or carelessness, was the immediate cause of the injuries in question, and with the exercise of ordinary care and prudence, on the part of said agents and employes, the injuries in question might have been avoided, then the jury will find for plaintiff."

"2. If the jury believe from the evidence that the injuries complained of by plaintiff were occasioned by

Drain v. The St. Louis, Iron Mountain & Southern Ry. Co.

the negligence of any agent, servant, or employe of defendant, whilst running, conducting and managing any locomotive, car, or train of cars in the city of St. Louis, then the jury should find for plaintiff, and assess his damages at such sum as may recompense him for the injuries proven to have been received by him, not exceeding the sum of twelve thousand dollars, provided that plaintiff was himself without fault, or negligence, directly contributing to the injury."

"3. The jury are instructed that it is the duty of defendant, when backing any freight car or locomotive propelled by steam power within the limits of the city of St. Louis, to have a man stationed on top of the car at the end furthest from the engine, to give danger signals."

"4. If the jury find for plaintiff, they will, in estimating the amount of damages, take into consideration the age and situation of the plaintiff, his bodily suffering and mental anguish resulting from the injury received, and the loss sustained by the bodily injuries received, and the extent to which he was disabled from making a support for himself by reason of such injuries."

"5. The jury are instructed that the right, on the part of the defendant, to run along Main street, in the city of St. Louis, is not an exclusive right, and does not deprive the residents of the city from using the same for the purpose of moving from place to place."

The following is instruction number seven, refused for defendant, and referred to in the opinion of the court:

"7. That if they find from the evidence that Drain was on the track of defendant when he was struck, and that he was guilty of negligence which directly contributed to his injury, in being on said track at that time; and that if they further believe, from the evidence, that

Drain v. The St. Louis, Iron Mountain & Southern Ry. Co.

the men in charge of the locomotive and car, or any one of them, did not see Drain, or know he was there, or in danger, until it was impossible to stop the same so as to avoid injuring him, then the jury should find for the defendant."

Finkelnburg & Rassieur for appellant.

(1) The court of appeals erred in finding that the trial court should have taken the case from the jury. The case should have gone to the jury, because (a) there is no evidence of contributory negligence in the case; (b) the evidence quoted by the court does not show any contributory negligence, unless violence be done to both the letter and spirit of the answers quoted; (c) The plaintiff, before crossing, looked and listened, and failing to perceive the danger, owing to the gross negligence of defendant, looking and listening did no good. *Fletcher v. Ry. Co.*, 64 Mo. 491; *Kincade v. Ry. Co.*, 45 Mo. 255. (2) The case should have gone to the jury, because: if the plaintiff had been guilty of contributory negligence, and defendant's brakeman had been at his place, he could have prevented the accident after the discovery that plaintiff had put himself in peril. *Kelly v. Ry.* 75 Mo. 140, and authorities cited therein. (3) Instructions number one and two, given on behalf of plaintiff, correctly laid down the general rule of negligence, and the liability of railroads, under the circumstances shown by the evidence, and have the sanction of this court in similar cases. *Whalen v. Ry.*, 60 Mo. 323; *Isabel v. Ry.*, 60 Mo. 475; *Hicks v. Ry.*, 64 Mo. 430; *Burham v. Ry.*, 56 Mo. 338; *Frick v. Ry.*, 75 Mo. 545. (4) When a railroad company runs cars in violation of law, it is negligence *per se*, and it is no excuse to show that by the exercise of extraordinary care and foresight, plaintiff might have avoided the injury. A person has a right to

Drain v. The St. Louis, Iron Mountain & Southern Ry. Co.

rely upon the presumption that railroads will operate their vehicles according to law, and if he uses ordinary care in regulating his conduct consistent with that presumption, he has done all that can be required of him. *Kennayde v. Ry.*, 45 Mo. 255; *Karle v. Ry.*, 55 Mo. 476; *Ernst v. Ry.*, 35 N. Y. 9; *Newson v. N. Y. Ry.*, 29 N. Y. 390. (5) Defendant's refused instructions were properly refused. *Brown v. Ry.*, 50 Mo. 461; *Isabel v. Ry.*, 60 Mo. 475. (6) In passing upon a demurrer to the evidence, the court is required to make every inference of fact in favor of the party offering the evidence. *Buesching v. St. L. Gas Light Co.*, 73 Mo. 231; *Wilson v. Board of Ed.*, 63 Mo. 137.

Bennett Pike for respondent.

(1) The plaintiff was not entitled to recover. It was his duty, when about to cross the railroad track, to have looked and listened for an approaching train. *Yorton v. Ry.*, 45 N. Y. 662; *Fletcher v. Ry.*, 64 Mo. 484; *Morris, etc., v. Haslon*, 4 Vroom, 149; *Runyon v. Central Ry.*, 1 Dutch. 357; *Chicago & Rock Island Ry. v. Still*, 19 Ill. 508; *Chicago & Alton Ry. v. Gutzner*, 48 Ill. 74; *North Pa. Ry. v. Heilman*, 49 Pa. 62; *The Bellefontaine Ry. v. Hunter*, 33 Ind. 336. (2) A failure to ring the bell, or to comply with the requirements of the ordinance read in evidence, does not raise the presumption that they were the cause of the injury. If the plaintiff, without signals, might, with care, have seen the moving car, or known it was approaching, he cannot recover. *Galena & Chicago Union Ry. v. Loomis*, 13 Ill. 548; *Chicago & Miss. Ry. v. Patchin*, 16 Ill. 198; *Galena & Chicago Union Ry. v. —*, 22 Ill. 264; *Butterfield v. Ry.*, 10 Allen, 532; *Leduke v. St. L., I. M. & S. Ry.*, 4 Mo. App. 488-490; *Lenix v. Mo. Pac. Ry.*, 76 Mo. 86; *Powell v. Mo. Pac. Ry.*, 76

Drain v. The St. Louis, Iron Mountain & Southern Ry. Co.

Mo. 80; *Bell v. Ry.*, 72 Mo. 50; *Wallace v. Ry.*, 74 Mo. 594. (3) The instructions given for plaintiff were erroneous. *Price v. Ry.*, 72 Mo. 414; *Zimmerman v. Ry.*, 71 Mo. 491; *Yarnell v. Ry.*, 75 Mo. 583. (4) The seventh instruction asked by defendant should have been given. For it makes no difference how negligent may have been the conduct of defendant's employes, in respect to the case in question, if plaintiff's negligence directly contributed to his injury, he cannot recover, unless the said employes discovered the negligence of plaintiff, in time to prevent the injury, by the use of ordinary care. Cooley on Torts, 674; *Burham v. St. L. & I. M. Ry.*, 56 Mo. 338; *Balt. & Ohio Ry. v. State*, 33 Md. 542-554. (5) The verdict was so grossly excessive as to imply misapprehension, on the part of the jury, as to the lawful object of damages in such a case. *Sawyer et al. v. H. & St. J. Ry.*, 37 Mo. 265; *Clapp v. Hudson River Ry.*, 19 Barb. 462; *Collins v. Alb. & Schenec. Ry.*, 12 Barb. 492; *Sweeney v. Old Col. & N. P. Ry.*, 12 Allen, 368.

RAY, J.—This is a suit by plaintiff for negligence by defendant's servants in causing a freight car to be detached and "kicked or shunted" by a locomotive along its track, across and along Main street, in the city of St. Louis, at a greater rate of speed than six miles an hour, and without any person on said car in control of the same, and without any light being placed thereon, or any bell being run, or any signal given of its approach, in violation of an ordinance of said city, requiring, in such case, the ringing of a bell, the placing of a brakeman on the end of the car furthest from the engine, to give danger signals, and restricting the speed of trains within the limits of the city to a velocity not greater than six miles an hour; that in consequence of such negligent and careless conduct of said servants and em-

Drain v. The St. Louis, Iron Mountain & Southern Ry. Co.

ployes, in permitting, or causing said car to run as aforesaid, plaintiff was knocked down in attempting to cross the track of said railroad, and was permanently injured in his leg, arm and head, etc. Defendant denied the negligence charged, and set up contributory negligence on the part of plaintiff. There was a denial of the contributory negligence.

Upon the trial of the cause in the circuit court, plaintiff had a verdict and judgment in his favor for \$6,500, from which the defendant appealed to the court of appeals, where the judgment was reversed, and cause remanded. From this judgment of the court of appeals the plaintiff has appealed to this court. The general features of the case, and the peculiar circumstances under which plaintiff was injured, are, perhaps, sufficiently set out in the opinion of that court (see 10 Mo. App. 531), and we need not re-state them. We adopt and approve the views expressed by the court of appeals, as to the negligence of the defendant upon this occasion. We think nothing need be added in this behalf. That court then says: "The only question in the case is whether the plaintiff was guilty of contributory negligence and whether this was shown with such conclusiveness as required the court to take the case from the jury." The court of appeals was of opinion that the plaintiff's contributory negligence was thus conclusively shown, and that the trial court erred in failing to give the instruction in the nature of a demurrer to the evidence, and for this reason alone reversed the judgment, and remanded the cause. The court, in its opinion, says that "it appears from the testimony of the plaintiff himself, that he did not look or listen for approaching cars before attempting to cross the track." The evidence of the plaintiff in this behalf is then set out, substantially, in the opinion, and so far as his evidence in chief is concerned, there is manifestly, we think, nothing affirmatively showing any omission on his part to exercise the

Drain v. The St. Louis, Iron Mountain & Southern Ry. Co.

usual and proper care ordinarily used and employed by ordinarily prudent persons under similar circumstances. He comes out of the mill to go home, and seeing an engine or train coming down, he stood still until it went past, and after that he says he neither saw nor heard anything indicating an approach of any car or train.

The foregoing statements, above quoted from the court of appeals, are based, we presume, however, upon the questions and answers of plaintiff in his cross-examination. He was asked the following: "You didn't stop to look for anything further, thinking that was the only train?" It would, we think, be difficult, and especially so for the unlettered mind, to answer a double complex question like this one in a perfectly satisfactory manner. There were, in fact, two inquiries of different forms of statement contained therein, to be answered by the witness. Stated directly and logically, these interrogations would be, "You thought that was the only train," and "You did not stop to look any further." Now, to these several inquiries, coupled together, in inverse order, the witness returned the answer, "yes, sir, that was the only train I saw." The question, then, is, what is the true meaning of this answer. The court of appeals seems to construe it to mean that the witness did not stop to look; but the said answer is, we think, to be interpreted: "Yes, sir (that is, I did not stop to look, or did look), and that was the only train I saw;" or, as an answer only to the last part of the question as asked, and to mean, "yes, sir (I did think it was the only train); it was the only one I saw." The question was repeated to the witness as follows: "You didn't stop to look for any more, supposing that was the only one to pass?" And the witness answered by one word, "Certainly." Certainly what? That he did not stop to look? If so, even this does not say, or show, necessarily, that he did not look, for he may have been intending to say he did not stop, but not intending to

Drain v. The St. Louis, Iron Mountain & Southern Ry. Co.

say also he did not look. But is there any more reason to say that the witness, when he thus answered "certainly," meant to say certainly, that is, I did not stop, than certainly I did stop. Or, again, is it not probable that the attention of the witness was directed to that part of the question last uttered, and that the answer meant "certainly, I supposed that was the only one to pass." It is a common habit, as we well know, to ignore the earlier parts of complex questions of this character, and to answer only the latter parts, to which the attention is last directed. The answers of the plaintiff do not, we think, clearly and conclusively show that he did not look or listen before going upon the track, and if the evidence was, in this respect, vague, uncertain, and ambiguous, the trial court could not properly determine the same, as a matter of law, and was authorized to allow the same to go to the jury for its determination.

Nor are we satisfied that the evidence in the cause was such as to show conclusively that the place where plaintiff was struck, and the space through which the car was running, just prior thereto, was lighted in any such manner as to enable the plaintiff, by looking, to see the car in time to escape and avoid the injury. It is conceded there was no light on the car itself, and it is further conceded that it was after dark when the accident happened. What light, if any, may have been afforded by the street lamps, is wholly a matter of conjecture. From the plat in evidence, and the testimony in the case, it is by no means clear that there was any light at these points, except that which came from the open door of the wire mill. It is true, that three of plaintiff's witnesses saw the car that ran over Drain, and testify as to its speed, and two of them also testified that there was no man in the car, which fact is conceded. But they all saw it either as it was crossing Chouteau avenue, or was entering, or about to enter, the freight house, which was lighted up. They all occupied different positions at the

Drain v. The St. Louis, Iron Mountain & Southern Ry. Co.

time from Drain, and none of them saw the car before it emerged from the darkness, on Drain's left, or before it struck him. The various facts and circumstances of this character, commented on by the court of appeals, undoubtedly had an important bearing upon the question, but the evidence was not clear, definite and certain, upon this issue of contributory negligence, and in a case of this sort it should be such before the court takes the same from the jury, and directs the finding as a matter of law.

Upon the theory of the case adopted by the court of appeals, as to the duty of the trial court to give the demurrer to the evidence, it was, as stated, unnecessary, of course, to consider the propriety of other instructions in the case. Our view of that question being different, it becomes necessary for us to consider the objections urged by the defendant as to the action of the trial court in that behalf. The instructions given for the plaintiff were five in number. No objections are urged, or specified, as to instructions numbered three or four, and the objection to the fifth, that it is erroneous and misleading, is, we think, not well taken. Instructions numbered one and two, are, perhaps, inaccurate and erroneous, and but for the state of facts to be mentioned directly, should work a reversal of the case. As applied to the facts in the cases cited by the respondent, they were held subject to similar criticisms made by counsel in this case, and were condemned by this court. In this case, to quote the language of the court of appeals, "leaving out of view the city ordinance, which was introduced in evidence (and we may add was also pleaded), the evidence shows a very clear case of negligence on the part of the defendant's servants. A compliance with the ordinance would have required that a man should be stationed on top of the car to give danger signals, and the evidence leaves no doubt that if such a man had been at his post, and discharging his duty, the accident

Barlow v. Delaney.

would not have happened. * * * Indeed, it is not claimed, on the part of defendant, that a case of negligence is not made out against it." If all this is so, as we think it is, then we think the imperfections and inaccuracies in said instructions are, as applied to this state of facts, wholly unimportant and immaterial, and could not have been to the defendant's prejudice. Under the circumstances and state of the evidence in this case, we see no error in the court's action in refusing defendant's instruction numbered seven.

As to the objections urged in this court, that the damages are excessive, we may say that the amount allowed is not so grossly excessive, at all events, as to call for the interference of this court upon that ground. Six thousand and five hundred dollars, at ten per cent., would yield annually six hundred and fifty dollars, and the current rate of safe investment would probably yield a far less sum. The evidence shows that plaintiff was earning, when disabled, eight or nine hundred dollars annually. In view of his disability, and extent and character of his suffering, we do not regard the damages as excessive. For these reasons the judgment of the court of appeals is reversed, and that of the circuit court affirmed. All concur.

BARLOW, *Appellant*, v. DELANEY *et al.*

Life Estate, Conveyance by Owner of: REMAINDERMEN. A suit to enforce a deed made by the owner of the life estate of the fee of land, cannot be maintained against the remaindermen, although they are the heirs of the grantor, and the conveyance by the latter contained covenants of general and special warranty.

Barlow v. Delaney.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

A. J. P. Garesche for appellant.

(1) Appellant bases his claim to relief upon the fact that the estate conveyed by Mrs. Boyce was her separate property, in respect to which she was competent to contract as a *feme sole*. Her warranty of title bound her estate and could be enforced in equity against it, and inasmuch as the heirs have received from her so much more than the two lots, they can be compelled to answer. Moreover, it being a case of exchange, the warranty of title is a lien upon all the property exchanged. *Metcalf v. Smith*, 40 Mo. 572. (2) The objection, that the deed is made by only one trustee, is untenable. Under such circumstances the signature of trustees is not required to effect a conveyance. 2 Spence's Eq. Jur. 513; 2 Perry on Trusts (3 Ed.) pp. 256-7, secs. 654-5; Adams Eq. Am. Notes, p. 137, sec. 45; 2 Story's Eq. Jur. (11 Ed.) sec. 1390; Will on Trustees, p. 665, sec. 425; Bishop on Law of Married Women, secs. 164, 191; *Jacques v. Methodist Episcopal Church*, 17 Johns. 578.

T. K. Skinker for respondents.

(1) The deed from Mrs. Boyce to plaintiff, Barlow, is a nullity. One of her two trustees, Charles A. Pope, failed to execute it. "Trustees have all equal power and interest, and must all join, both in conveyances and receipts." 2 Coke Litt. (Marg. notes, Ed. 1836), 488. "They all form but one collective trustee." *Vandever's Appeal*, 8 Watts & Serg. 405. Must all join in conveyance of the trust property. *Sinclair v. Jackson*, 8 Cow. 543, 553; *Ridgely v. Johnson*, 11 Barb. 527; 2 Spence

Barlow v. Delaney.

Eq. Jur. (Ed. 1850) *366; 2 Story Eq. Jur. (Redf. Ed.) secs. 1062, 1284 *c*; 1 Perry on Trusts (2 Ed.) sec. 413; Hill on Trustees (3 Am. Ed.) *305; *Boston v. Robbins*, 126 Mass. 384; *Ham v. Ham*, 58 N. H. 70; 71 Ill. 93. Henry Boyce, the husband, did not join in its execution. R. S., 1879, sec. 669; G. S., 1835, p. 444, sec. 2; *Sutton v. Casselleggi*, 77 Mo. 404; *Huff v. Price*, 50 Mo. 228. (2) But conceding the deed to be valid, it passed only Mrs. Boyce's life estate. As she was a married woman at the time she made it, the covenants contained in it, and which are sought to be enforced in this case, are not binding, either upon her or upon her heirs, these defendants. R. S., sec. 669; G. S., 1865, p. 444, sec. 2; *Pratt v. Eaton*, 65 Mo. 165; *State Nat. Bk. v. Robidoux*, 57 Mo. 446; *Reese v. Smith*, 12 Mo. 348; *Botsford v. Wilson*, 75 Ill. 132; *Strawn v. Strawn*, 50 Ill. 34; *Griner v. Butler*, 61 Ind. 362; *Hovey v. Smith*, 22 Mich. 172. A married woman is not estopped by her covenant from asserting an after-acquired title. *Hempstead v. Easton*, 33 Mo. 147; *Jackson v. Vanderheyden*, 17 John. 167; *Lowell v. Daniels*, 2 Gray, 168; Rawle on Covenants (4 Ed.) 402, note 1, 538, note 3. Upon this principle, if Mrs. Boyce had acquired the title of her children (these defendants), she might have asserted it. *A fortiori* may they do so, having been no parties to the covenant. (3) Independent of the fact that Mrs. Boyce was a married woman, her covenant is ineffectual to bar the right of her heirs to this land. To enforce it would be to apply the ancient doctrine of collateral warranty. 1 Black. Com. (Book 2) 300-303; 3 Wash. Real Prop. (4 Ed.) 481, 482; *Hartman v. Lee*, 30 Ind. 281; *Jones v. Franklin*, 30 Ark. 631, 637. The doctrine of lineal and collateral warranties is abolished by statute. R. S., 1879, sec. 3944; G. S., 1865, p. 442, sec. 7. Even whilst this ancient doctrine was in full vigor, a covenant, whereby a parent owning a life estate sought to disseize his heir, tenant in fee, was held to be an exception to the general

Barlow v. Delaney.

rule and void against the heir. 1 Black. Com. (Book 2) 302.

HENRY, C. J.—Plaintiff filed his petition in the circuit court of St. Louis, alleging as his cause of action, substantially the following facts: In April, 1867, Mrs. Octavia Boyce, a married woman, to whose sole and separate use two trustees held the legal title to the lots of land described in the petition, made an exchange of said lots with plaintiff, and she and one of her said trustees joined in a deed, conveying to plaintiff said lots, in fee-simple, with covenants of general and special warranty, and, at the same time, he, by deed, conveyed to her and her trustees, several lots of real estate, situate in the city of St. Louis, to be by them held as her separate estate. That it has recently come to plaintiff's knowledge that Mrs. Boyce had only a life estate in the lots she conveyed to plaintiff. That by the last will of her sister, Mrs. Ann Biddle, they were devised to her for life, with remainder in fee to her children. That Mrs. Boyce has since died, and her children assert their title to said lots conveyed by their mother to him, and that said children are in the peaceable possession of the lots of land conveyed by him to their mother, and of other lands inherited by them from her, of the value of \$300,000. That the lots conveyed to plaintiff by Mrs. Boyce are of the value of \$7,000, and the prayer of the petition is that the title to the lots conveyed by Mrs. Boyce to plaintiff, be vested in the plaintiff. The court sustained a demurrer to the petition, and on appeal to the St. Louis court of appeals, that judgment was affirmed, and plaintiff has appealed to this court.

A question elaborately discussed in the brief of appellant's counsel and in the opinion delivered by the court of appeals, is whether Mrs. Boyce and one of her trustees could make a valid conveyance. But whether she could, or not, a more important question, and one

Barlow v. Delaney.

equally decisive of the case, is whether, conceding that she had a right to convey, and that her covenants in her deed are obligatory upon her, they estop her children from asserting their title to the lots in controversy. The action is not one to remove a cloud from a good title, but to take the fee-simple title out of defendants, and vest it in plaintiff. The title in fee-simple is admitted to be in the heirs, and the object of this suit is to set up an estoppel against them in equity based upon the covenants in the deed of Mrs. Boyce. These defendants, her children, do not derive their title from their mother, either by descent or by purchase. They claim under the will of Mrs. Biddle, and, if the covenants in Mrs. Boyce's deed are at all obligatory upon her children, they are answerable to the extent of the lands descended from her, or devised by her to them.

By section 7, General Statutes, page 442, revision of 1865, "lineal and collateral warranties, with all their incidents, are abolished; but the heirs and devisees of every person who shall have made any covenant or agreement (shall be answerable upon such covenant or agreement), to the extent of the lands descended or devised to them in the cases and in the manner provided by law." Suppose that Mrs. Boyce had had no property at her death, not even that received by her from plaintiff in exchange for the lots in controversy, would it be contended that, by the covenants in her deed to plaintiff, her children would be estopped, either in law or in equity, from asserting their title? If she had but a life estate, that was all she could dispose of, and her covenants of warranty cannot have the magical effect of investing her grantee with an estate she did not have.

It is urged that it would be inequitable to permit defendants to hold the lots of land conveyed by plaintiff, and, also, recover the lots in controversy; but if they should recover these lots and the covenants in Mrs. Boyce's deed are binding upon her children, then, to the

Doering v. Kenamore.

extent of the estate they inherited from her, plaintiff will have his action on the covenants. If they were of no binding force, either upon her or her heirs, plaintiff certainly has no legal demand against them which can be enforced against these lots. He may have an equitable right to have the lots conveyed by him charged with a lien for the unpaid purchase price, which would be the value of the lots conveyed by Mrs. Boyce at the time of that conveyance, but in no event has he the right to have their title in the lots in question vested in him.

The judgment of the court of appeals is affirmed.

DOERING, *Appellant*, v. KENAMORE.

1. **Personal Property : GIFT.** Delivery of possession, either actual or constructive, is essential to a gift of corporeal personal property.
2. ——— : ———. Where such property is in the adverse possession of another, there can be no delivery, and, hence, no gift.
3. **Replevin : TORT, ASSIGNMENT OF.** Replevin will lie for the possession of mules stolen from the owner in favor of his assignee of the right of action therefor. Following *Snyder v. Ry.*, *post*, p. 613.

Appeal from Dent Circuit Court.—HON. C. C. BLAND,
Judge.

REVERSED.

A. M. McElhinney for appellant.

Smith & Krauthoff and L. B. Woodside for respondent.

(1) The plaintiff could not recover as assignee of his father's cause of action. Causes of action sounding in

Doering v. Kenamore.

tort are not assignable. R. S., sec. 3462; *Wallen v. Ry.*, 74 Mo. 521. The same principle applies alike in trover and replevin. *Parmlee v. Loomis*, 24 Mich. 243; *Hissler v. Carr*, 34 Cal. 641; *Dame v. Dame*, 43 N. H. 37; *Pace v. Pierce*, 49 Mo. 393; *Crocker v. Mann*, 3 Mo. 472. (2) Plaintiff could not recover on the theory of a gift of the mules to him by his father. A delivery of the property was essential to pass the title by way of gift. 1 Parsons on Contracts (5 Ed.) 234; *Spencer v. Vance*, 57 Mo. 427; 2 Schoulers, on Per. Prop. 68, 69, 70; *Walter v. Ford*, 74 Mo. 195; *Noble v. Smith*, 2 John. 52; *Hanson v. Millet*, 55 Me. 184. (3) The plaintiff must recover, if at all, upon the ownership of the mules at the time alleged in the petition. Evidence that he subsequently became invested with the title was insufficient. There is a broad distinction between ownership of property at the time of its unlawful taking and the acquisition of title subsequently. *Waldhier v. Ry.*, 71 Mo. 514; *Capital Bk. v. Armstrong*, 62 Mo. 59; *Iron Mountain Bk. v. Armstrong*, 62 Mo. 70.

NORTON, J.—This was an action of replevin for two mules. The plaintiff alleged in his petition that he was “the owner and entitled to the possession” of the property sued for. The defendant filed a general denial. The case came on for trial before a jury. At the close of the plaintiff’s testimony, the court gave an instruction to the effect that there was no such proof of title in the plaintiff as would sustain the action, and that their finding would have to be for defendant. Thereupon, the plaintiff took a non-suit, and prosecutes his appeal to reverse the judgment, which was entered upon it in favor of defendant.

The evidence is very clear that the mules, in April, 1878, belonged to Adam Doering, who was father of the plaintiff; that between the sixth and seventh of April, 1878, they were stolen from his stable in St. Louis

Doering v. Kenamore.

county, where he was residing ; that he heard nothing of them till January, 1880, when he learned they were in Salem, Dent county ; and that, "being an old man, he gave his right to the mules to his son, the plaintiff, Alfred Doering ; that he told him if he could get them, he could have them." This was the testimony of Adam Doering himself. Henry Doering, the plaintiff's brother, testified that he saw the mules in January, 1880, in defendant's possession. Alfred Doering, the plaintiff, testified that after his father heard the mules were in Dent county, he "gave him the right to the mules, and told him to go and get them and they were his." He then repaired to Dent county, demanded the mules from defendant, and was refused. He returned home, and testifies that "his father again told him to get the mules and they were his." He then brought suit. It appears from the testimony of other witnesses that the mules were brought to the stables of one Kessler, in Dent county, on the evening of the ninth of April, 1878, by two men, whose names are not given ; that one of them left the next morning, and the other one remained and traded off the mules to defendant a few days afterwards. A Mr. Miles testified, that one Saturday night in March or April, 1878, he was attending a party at Gray's Summit, Franklin county, and discovered, after midnight, that a saddle had been stolen from his horse tied outside, and that the saddle which accompanied these mules upon their arrival in Dent county, and shown to the witness, was his saddle, stolen as above related.

This was the substance of the evidence, and the sole question is, whether it sustains such right of property in the plaintiff as he must have in order to maintain the action of replevin or trover. There was no contradiction of the testimony showing that the mules were stolen from the plaintiff's father in April, 1878. Unquestionably, the evidence failed to establish a gift of the mules to the plaintiff by his father. Delivery of posses-

Webb v. Toms.

sion, either actual or constructive, is an essential element to a gift of corporeal personalty. 1 Pars. on Cont. (6 Ed.) 234. As the mules were in the adverse possession of defendant, neither actual nor constructive possession could be given, and for that reason there was no gift.

In considering the declarations made by the donor, it would seem that he was conscious of this fact. According to the natural import of his language, he did not assume to bestow upon his son the corporeal chattels now sued for, but only to transfer to him the right to said chattels, the donee assuming the burden of reducing them to his possession. It is objected on the part of defendant that, as the mules were held adversely to the donor, the right which remained in him was only a chose in action, and that as it did not arise on contract, any assignment or transfer of it is forbidden by our practice act. R. S. 1879, sec. 3462. According to the ruling of this court, made at the present term in case of *Snyder v. Wabash, St. Louis & Pacific Ry. Co.*, post, p. 613, this point is not well taken.

The judgment is reversed and the cause remanded, in which all concur; Judge Henry concurring in the result.

WEBB V. TOMS *et al.*, Appellants.

Parol Contract for Sale of Lands : SPECIFIC PERFORMANCE : STATUTE OF FRAUDS. Where one seeks the specific performance of a parol contract for the sale of land, and makes out a case of part performance sufficient to take the case out of the statute of frauds, the court should find the balance due on the purchase price, if any, and on payment of the same into court vest the title in the vendee.

Appeal from Jasper Circuit Court.—HON. M. G. MCGREGOR, Judge.

Webb v. Toms.

REVERSED.

Phelps & Brown and *Smith & Krauthoff* for appellants.

The answer of defendant Teel admitting plaintiff's ownership of property in controversy, and setting up an equitable defence, converted the case wholly into an equitable proceeding, and the case was tried upon that theory in the court below. *Hodges v. Black*, 76 Mo. 537. The judgment of the court below, in favor of the plaintiff for the south half of lot fifty-seven, was entirely unsupported by the evidence. When there has been part performance of a parol contract for the sale of land, and the purchaser has been let into possession, and made actual improvements, with the knowledge and acquiescence of the vendor, the contract is not within the reason of the statute of frauds, and a specific performance of such contract will be compelled. *Freeman v. Freeman*, 43 N. Y. 34; 3 Am. Rep. 657; *Miller v. Ball*, 64 N. J. 286; *Patterson v. Copeland*, 52 How. 460; *Edwards v. Fry*, 9 Kan. 417; *Howe v. Rodgers*, 32 Tex. 218; *Pecham v. Barker*, 8 R. I. 17; *Bowles v. Watham*, 54 Mo. 261, and cases cited. Courts of equity regard the taking of possession, and making improvements upon the faith of a parol contract, as a substitute for the memorandum required by the statute, without reference to the inquiry whether the benefits received by the purchaser equal or exceed the improvements put upon the land by him. *Mims v. Lockett*, 33 Ga. 9. The contract being fully executed by one party, equity demands that the other party shall be compelled to perform his part of it. *Walker v. Walker*, 2 Ark. 100; *Wheeler v. Reynolds*, 66 N. Y. 227.

Joseph Cravens for respondent.

The appellant, claiming to be the owner of Mrs.

Webb v. Toms.

Toms' interest in the premises, prays to have the title vested in him. "The contract, whose specific performance is sought, should be certain, mutual, and capable of being performed." Story's Eq. Juris., secs. 723, 736, 751. The party asking such relief, must establish, beyond question, that he has performed every condition in such contract. Payment of all the purchase money alone is not sufficient. The taking possession and making improvements alone are not sufficient. These must all concur to take such contract out of the statute of frauds. *Parker & Brown v. Leewright*, 20 Mo. 85; *Bean et al v. Valle et al*, 2 Mo. 83; *Chambers et al v. Lecompt*, 9 Mo. 567; *White v. Watkins*, 23 Mo. 423; *Townsend v. Hawkins*, 45 Mo. 286; *Johnson v. McGrowder*, 15 Mo. 365; *Despain v. Carter*, 21 Mo. 331; *O'Fallon v. Kennedy*, 45 Mo. 124; 19 Mo. 125; 54 Mo. 261. There is no evidence or pretense, except in appellant's answer, that the fifty dollar consideration was ever paid or tendered.

BLACK, J.—This was ejectment for lot fifty-seven in Webb City. The defendant, Teel, answered that plaintiff made an agreement with Amanda Toms, whereby, in consideration of fifty dollars to be paid by her, and that she would take possession of the lot and build a house thereon, he would convey the same to her; that she performed all these agreements on her part; and that defendant has acquired her interest in the lot. There was also a prayer for affirmative relief.

The proof shows that the plaintiff agreed to give Mrs. Toms the lot in consideration that she would build a house upon it, which she did do, and which cost some one thousand and two hundred dollars, and that afterwards he agreed to sell to her lot fifty-eight for fifty dollars, which she paid to plaintiff. It was con-

Shaw v. Shaw.

ceded on the trial that Teel had acquired all the rights of Mrs. Toms to lot fifty-seven. The court found for plaintiff as to the south half of the lot, and gave defendant a decree of title to the north half.

Why the pleadings were not amended to conform to the proof, we are not informed. If the defendant was entitled to any part of the lot, he was entitled to have a decree for the whole. Even upon the pleadings, as they stand, and the proofs as they appear to have been made from this bill of exceptions, the court should have found the amount of the balance due upon the lot, and, upon the payment of the same into court for the plaintiff, awarded the defendant a decree for the title to the whole lot.

There is no question of the specific enforcement of a building contract in this case. The contract, in this respect, was executed. By part performance the agreement, though in parol, is taken out of the statute of frauds. The judgment is reversed, and cause remanded for new trial, with leave to parties to amend, if they, or either, see fit so to do. All concur.

SHAW, *Appellant*, v. SHAW.

1. **Trusts and Trustees.** Where fiduciary relations exist between parties, the trustee cannot purchase property in which his beneficiary has an interest, without such property becoming impressed in his hands with the nature of the trust, and it makes no difference that the trustee did not purchase at the sale, but afterwards and during the existence of such relations, took the bid of a stranger off his hands.
2. **Resulting Trusts: STATUTE OF FRAUDS: EVIDENCE.** Resulting trusts are not within the statute of frauds, and parol evidence may

Shaw v. Shaw.

be resorted to, to establish them, but to have that effect, such evidence must be almost conclusive in its character.

3. — : PURCHASE MONEY. The controlling question in the consideration of resulting trusts is the ownership of the purchase money. If such ownership be established in such manner as to leave no room for reasonable doubt in the mind of the chancellor, the resulting trust springs into being, by implication of law, and follows the ownership of the money. And the same rule holds as to a portion of the purchase money as to all of it, the resulting trust attaching in the ratio of ownership.
4. Practice : JURISDICTION : APPEAL. The circuit court does not, by granting an appeal, lose jurisdiction in a cause, and a bill of exceptions may be filed and acted upon after appeal granted.

Appeal from St. Louis Court of Appeals.

REVERSED.

Lackland & Wilson for appellant.

(1) When a person has money of another in his hands and purchases real estate with it and takes the deed in his own name, a resulting trust arises in favor of the one who advances the money in whole or in part. The resulting trust arises, whether the money is put into the hands of the alleged trustee expressly for the purpose of buying the land, or whether the alleged trustee, having the money already in his hands for another purpose, invests it in land in his own name, without the knowledge of the owner of the money. "A similar rule prevails in cases where the consideration proceeds from two or more jointly, and the conveyance is taken in the name of one of them only. A resulting trust will arise in favor of the parties not named in the conveyance, in proportion to the amount of the consideration which they may have respectively contributed." *Hill Trustees*, 92, side page, and note ; 38 Mo. 41. The statute of frauds is intended to prevent frauds, and not to promote and sustain frauds. R. S. 1879, sec. 2512 ; *Stephenson v. Smith*, 7 Mo. 610 ; *Rankin v. Harper*, 23 Mo. 579 ; *Baumgart-*

Shaw v. Shaw.

ner v. Guessfield, 38 Mo. 36, 41; *Thomson v. Reuse*, 12 Mo. 157; *Rose v. Bates*, 12 Mo. 30, 51; *Paul v. Chouteau*, 14 Mo. 580; *Valle v. Bryan*, 19 Mo. 423; *Grove's Heirs v. Fulsome*, 16 Mo. 543; *Carman v. Johnson*, 20 Mo. 108, 110; *Cason v. Cason*, 28 Mo. 47; *Kelly v. Johnson*, 28 Mo. 249; *Key v. Jennings*, 66 Mo. 366; 2 Story's Equity, sec. 1201, 634-636 (6 Ed.); *Hale v. Stuart*, 76 Mo. 20, 22; *Buren v. Buren*, 79 Mo. 538. (2) The findings of the trial court are fully and clearly sustained by the evidence in this case, and this court will defer somewhat to the findings of such court on matters of fact, even in equity cases. *Ryan v. Young*, 79 Mo. 34; *Hendricks v. Woods*, 79 Mo. 599; *Boyle v. Jones*, 78 Mo. 406; *Chapman v. McIlwraith*, 77 Mo. 43; *Chouteau v. Allen*, 70 Mo. 336. The finding of a chancellor will not be disturbed by the Supreme Court, unless he has manifestly disregarded the evidence. *Snell v. Harrison*, 83 Mo. 651; *Ford v. Phillips*, 83 Mo. 523. (3) There is no legal bill of exceptions in this case. The court had no right to allow the bill of exceptions to be filed after the appeal was granted. There was no agreement between counsel or consent of court, and the court had lost jurisdiction by granting the appeal. A new paper cannot be filed in the case after an appeal is taken (*Ladd v. Couzins*, 35 Mo. 513, 515; *Stewart v. Stringer*, 41 Mo. 400), and the power of the inferior court over the subject is exhausted. *Bril v. Meek*, 20 Mo. 358.

T. F. McDearmon for respondent.

(1) "To warrant the destruction of a legal title by decree of a resulting trust, the proof should be of the most conclusive character." *Sharp v. Berry*, 60 Mo. 575; *Kennedy v. Kennedy*, 57 Mo. 73; *Ringo v. Richardson*, 53 Mo. 394; *Forrister v. Scoille*, 51 Mo. 268; *Johnson v. Quarles*, 46 Mo. 423; *Snelling v. Utterback*, 1 Bibb, 609; *Baker v. Aining*, 30 Maine, 121; *Malin v.*

Shaw v. Shaw.

Malin, 1 Wend. 625; *Enos v. Hunten*, 9 Ill. 211; *Boyd v. McLean*, 1 Johns. Ch. 582; *Faringer v. Ramsey*, 2 Md. 365; *Id.* 447; *Holiday v. Shoop*, 4 Md. 465; Leading Cases in Equity (Hare & Wal. notes) 272, 276, 280, 283; Hill on Trusts, 148, 149, 151. (2) "If one who stands in no fiduciary relation to another, appropriates the other's money, and invests it in real estate, no trust results to the owner of the money." 1 Perry on Trusts, p. 144, sec. 128. The testimony in the case shows that the defendant, at the time of the purchase of the property, was not standing in any fiduciary relation to the plaintiff, or acting in any fiduciary capacity for her. (3) Even if the testimony establishes a trust, the judgment is excessive. (4) It was error for the circuit court to make the judgment a special lien on the real estate, and order it sold and a special *fiery facias* for this purpose.

SHERWOOD, J.—This proceeding was instituted in the St. Charles circuit court, having for its object the enforcement of a resulting trust and for an accounting. As the substance of the evidence will accompany this opinion, it is unnecessary to encumber it with the details of the testimony. It will only be requisite, therefore, to state in brief the deductions we make from that testimony, and our reasons therefor.

I. The admissions made by the defendant when testifying, as well as other testimony in the cause, establishes, beyond doubt or question, the existence of fiduciary relations between the plaintiff and the defendant. It cannot be doubted that those relations existed at the time of the purchase of the property by Field, and that if the defendant, instead of Field, had made that purchase, the property bought in the first instance would have borne the impress and felt the force of those fiduciary relations. But the complexion of this case is no ways altered, because of defendant taking the bar-

Shaw v. Shaw.

gain of Field off his hands. He remained a fiduciary until the purchase from Field was fully consummated, and he could no more throw off the trust he had assumed by purchasing from Field, than if he had bought directly at the sale. And his own admissions made, when on the witness stand, show that when he bought from Field, paid him one hundred dollars, and took his receipt, he was still acting in his voluntary assumed capacity of trustee for the protection of his sister's interests.

II. But aside from any question of fiduciary relations, the evidence is sufficient to establish a resulting trust in behalf of the plaintiff. Such trusts are not within the statute of frauds (R. S., sec. 2512; *Grove v. Fulsome*, 16 Mo. 543; *Cason v. Cason*, 28 Mo. 47), and parol evidence may, therefore, be used to establish them. It is true, such evidence must be well nigh conclusive in its character; but the main point, the controlling question in inquiries of this nature, is the ownership of the purchase money. If such ownership be established by parol in such manner as to leave no room for reasonable doubt in the mind of the chancellor, the resulting trust springs into being by implication of law, and follows the ownership of the money. There is no dispute in this case as to the ownership of the stock in question, and the only matter really in dispute was whether it was loaned to defendant by plaintiff. On this point, the direct testimony on the part of plaintiff, as well as the acts of the defendant, are inconsistent with the idea of a loan and repugnant thereto. It must be obvious that the circumstances of this case differ, and differ widely, from those which formed the bases of adjudications cited by counsel for defendant. We still adhere to those adjudications, but hold, also, that the ownership of the stock, having been unquestionably established to be in the plaintiff, and no loan having been satisfactorily proven by defendant, the usual results must follow such a state

Bell v. The Hannibal & St. Joseph Railway Co.

of facts. And the same rule holds as to a portion of the purchase money as to all of it, the resulting trust keeping tally with the ratio of ownership. *Baumgartner v. Guessfield*, 38 Mo. 36.

III. It is urged by plaintiff that the appeal in this cause was taken long prior to the filing of the bill of exceptions; that though that bill was filed during the term, that the circuit court had no jurisdiction to act after appeal granted, and, therefore, the court of appeals had nothing to act upon. We have ruled to the contrary of this position in *State v. Lewis*, 71 Mo. 170.

The judgment of the court of appeals is reversed, and that of the circuit court affirmed. All concur.

BELL *et al.* v. THE HANNIBAL & ST. JOSEPH RAILROAD
COMPANY, *Appellant*.

1. **Evidence : HUSBAND, COMPETENCY AS WITNESS.** A husband, who is a co-plaintiff with his wife in an action under Revised Statutes, section 2121, for the death of their son, is a competent witness on the trial of the cause.
2. **Contributory Negligence, Negligence of Defendant After Discovery of.** Although one who is struck and killed by a train while standing on a railroad track is guilty of contributory negligence in so being in a place of peril and danger, yet the railroad will still be liable for the accident if its engineer discovered the danger of the deceased, and, after such discovery, by the use of any means within his power consistent with the safety of the train, could have avoided the injury.
3. **Proximate Cause.** The failure of the engineer in such case to use the means possessed at the time and adequate to prevent the injury is the proximate cause of the accident.
4. **The pleadings in this case** held to raise the question of the railroad's negligence after becoming aware of the danger of the

Bell v. The Hannibal & St. Joseph Railway Co.

deceased, and also, held that the evidence presented a proper question for the jury thereon.

On re-hearing.

Upon a review and reconsideration of the whole case, held that the death of the deceased was occasioned directly and solely by his own gross carelessness in going and remaining upon the railroad track, without looking or listening for the approach of the train, and that there is no evidence in the record that the servants of defendant in charge of the engine and train could have avoided the injury after discovering the danger of the deceased, or that upon the discovery of his presence and peril upon the track they failed or omitted to use any means within their power to avoid and prevent the accident, and that, therefore, the demurrer to the evidence should have been sustained (Ray, J., dissenting).

Appeal from Linn Circuit Court.—HON. G. D. BURGESS,
Judge.

REVERSED.

G. W. Easley and Smith & Krauthoff for appellant.

(1) The plaintiff, Jno. A. Bell, being a party jointly and equally interested with his wife (R. S., 1879, sec. 2121), in the judgment, was, by the marital relation, disqualified from being a witness. This was undoubtedly true at common law. Best on Ev. (Chamberlayne's Ed.) 131, note b, 4; 2 Kent's Com. 179; 1 Greenleaf's Ev., sec. 334; 3 Bacon's Ab. Evidence A. 1; *Paul v. Leavitt*, 53 Mo. 595; *Haerle v. Kreihn*, 65 Mo. 205. The reason for the exclusion of husband and wife at common law, being social policy and not interest, statutes removing the disqualification arising from interest do not remove the disability arising from the marital relation. 1 Whart. on Ev., sec. 430; *Lucas v. Brooks*, 18 Wall. 452; *Kelly v. Drew*, 12 Allen 109; *In re David W. Jones*, 6 Bissell, 69; *Stanley v. Stanton*, 36 Ind. 445; *Hasbrook v. Vandervort*, 9 N. Y. 153; *Dawley v. Ayers*, 23 Cal. 108; *Gee v. Scott*, 48 Texas, 510; *Cram v. Cram*, 33 Vt. 15; *Mitchinson v. Cross*, 58 Ill. 366;

Bell v. The Hannibal & St. Joseph Railway Co.

Kelly v. Proctor, 41 N. H. 139. (2) The deceased was guilty of the "grossest negligence beyond all dispute, a negligence difficult to be accounted for, assuming him to have been a young man of ordinary intelligence and without any defect of sight and hearing, and there is no proof that he was not." *Bell v. Hannibal, etc., Ry. Co.*, 72 Mo. 59. If the deceased had looked or listened he could have seen or heard the train and avoided the injury. That he did not do so is such contributory negligence as prevents a recovery; and the facts being undisputed there was nothing to submit to the jury, and defendant's demurrer to the evidence should have been sustained. *Powell v. Mo. Pacific Ry.*, 76 Mo. 80; *Lenix v. Ry. Co.*, 76 Mo. 86; *Baltimore, etc., Railroad v. State, etc.*, 65 Md. 648; 4 A. & E. R. R. Cas. 574; *Lake Shore, etc., Ry. Co. v. Hart*, 87 Ill. 529; s. c., 19 Am. Ry. Rep. 249; *Harlan v. St. Louis, K. C. & N. Ry. Co.*, 65 Mo. 22; 64 Mo. 480; *Railroad Company v. Huston*, 95 U. S. 697; *Stillson v. H. & St. Jo. Ry. Co.*, 67 Mo. 676; *Finlayson v. Ry. Co.*, 1 Dill. 579; *Fletcher v. Ry. Co.*, 64 Mo. 484; Field on Damages, p. 164, sec. 173; *Blaker's Exr's v. Ry. Co.*, 18 Am. L. R. (N. S.) 562; *Salter v. Ry. Co.*, 75 N. Y. 273. "So it is held gross negligence for a person to stop on a railroad track at the usual time for the passage of a train, and allow his attention to be diverted in another direction from the cars until he is thrown from the track by a collision." Weeks' Dam. Abs. Inj. 243; *Ry. Co. v. Knowles*, 30 Conn. 313. (3) Plaintiff's sixth instruction is erroneous; it ignores Bell's contributory negligence and directs a verdict notwithstanding such negligence. The rule sought to be invoked by this sixth instruction, can have no application to a case like this where the negligence of the injured party continues up to and commingles with the negligent act of the defendant in producing the injury. *Cagney v. H. & St. Jo. Ry. Co.*, 69 Mo. 424; *Zimmerman v. H. & St. Jo. Ry. Co.*, 71 Mo. 484; *O'Brien*

Bell v. The Hannibal & St. Joseph Railway Co.

v. *McClinchey*, 68 Me. 552; *Moak's Underhill on Torts*, 283; *Murphy v. Dean*, 101 Mass. 466; *Pierce on Railroad*, 327; *Big. Lea. Cas. on Torts*, 725; *Nelson v. A. & P. Ry. Co.*, 68 Mo. 593; *Lucas v. New Bedford, etc., Ry. Co.*, 6 Gray, 64; *Waite v. North Eastern Ry. Co.*, 9 El. & Bl. 719; *O'Donnell v. Mo. Pacific Railroad*, 7 Mo. App. 190. (4) Contributory negligence is a complete defence to an action for a merely negligent injury. It is only when the injury sued for is alleged, in terms or substance, to have been wilfully committed, that contributory negligence ceases to be a defence. *Pa. Co. v. Sinclair*, 18 A. L. R. (N. S.) 378; *Terre Haute, etc., Railroad v. Graham*, 12 A. & E. Ry. Cas. 77. (5) The sixth instruction given for the plaintiff should have been refused because the pleadings did not raise the question of negligence after becoming aware of the danger in which the deceased was placed. *O'Donnell v. Mo. Pacific Ry.*, 7 Mo. App. 190; *Zimmerman v. Hannibal, etc., Ry. Co.*, 71 Mo. 484; *Duncan v. Fisher*, 18 Mo. 403; *Harris v. Railroad*, 37 Mo. 307; *Link v. Vaughn*, 17 Mo. 585; *Newham v. Kenton*, 79 Mo. 382. (5) There is no affirmative evidence of the want of care on the part of the engineer, after discovering Bell's danger, which caused the accident and there being no presumption of such want of care the instructions and verdict are without evidence to support them. *Baulec v. Railroad*, 59 N. Y. 356.

S. P. Huston and *A. W. Mullins* for respondents.

(1) Respondent, John A. Bell, was a competent witness. He is made so by our statute. R. S., sec. 4010; *Steffen v. Bauer*, 70 Mo. 399, 404-5; *Cooper v. Ord*, 60 Mo. 420; *Haerle v. Kreihn*, 65 Mo. 202, 205-6; *Fugate v. Pierce*, 49 Mo. 441; *Buck v. Ashbrook*, 51 Mo. 539; *Wood v. Broadley*, 76 Mo. 23; *Schouler on H. & W.* sec. 85. (2) The rule of law is well settled in this

Bell v. The Hannibal & St. Joseph Railway Co.

court that if an injury results to a person on a railroad track by reason of such person being struck by a locomotive or train, caused by the negligence of the servants or employes of the railroad company in charge of the train, without concurring negligence on the part of the injured person, the railroad company is liable. And in case the injured person was negligent, or even a trespasser on the track, yet, if after discovering the danger and peril in which his negligence had placed him, or after a proper observance of their duties would have informed them of his peril, the employes in charge of the train fail to use ordinary care, skill and caution to prevent injury, and an injury thereby results, the railroad company is liable. *Morrissey v. Wiggins Ferry Co.*, 43 Mo. 380; *Brown v. H. & St. Joe Ry. Co.*, 50 Mo. 461; *Kennedy v. N. M. Ry. Co.*, 36 Mo. 351; *Burnham v. St. L. & I. M. Ry. Co.*, 56 Mo. 338; *Meyers v. C., R. I. & P. Ry. Co.*, 59 Mo. 223, 231; *Karle v. K. C., St. J. & C. B. Ry. Co.*, 55 Mo. 476; *Isabel v. H. & St. Joe Ry. Co.*, 60 Mo. 475; *Harlan v. St. L., K. C. & N. Ry. Co.*, 65 Mo. 22; *Bell v. H. & St. Joe Ry. Co.*, 72 Mo. 50. (3) The instructions given for the plaintiff are in precise accord with the very letter and spirit of the opinion of this court when the cause was here before. 72 Mo. 50. (4) The evidence was sufficient to require the submission of the case to the jury, and the court, therefore, did not err in refusing defendant's demurrer to the evidence. The train, as plainly appears from the evidence, was run at a reckless and very dangerous rate of speed, considering the time and place, when it came into the town, and this, too, without announcing its approach by the giving of any signals or ringing of the bell, aside from the station whistle half a mile from the town; and that although the engineer came in sight of plaintiffs' son when at least six hundred feet from him, no alarm signal was even given nor the bell rung until the train had approached to within one hundred and sixty

Bell v. The Hannibal & St. Joseph Railway Co.

to two hundred and twenty feet of him, and nothing whatever appears to have been done up to that time, nor subsequently until after the boy was struck and killed, to stop the train, put it under control, or slacken its speed, notwithstanding the engineer saw that the boy appeared to be, as he was, wholly unaware of the coming of the train. These facts and the attending circumstances tend to show the grossest negligence on the part of the engineer in the running and management of, or rather failure to manage his train, and his failure to duly notify or attempt to notify the deceased of the coming of the train, and his failure to duly resort to any of the ordinary means to try to avoid the calamity. *Pa. Railroad v. Lewis*, 79 Pa. St. 33; *C. & A. Ry. Co. v. Engle*, 84 Ill. 397; *Pryor v. Railroad*, 69 Mo. 215, 218; *Massoth v. Canal Company*, 64 N. Y. 524; Wharton on Negligence, sec. 388, and note 5 (2 Ed.); 1 Thompson on Negligence, p. 418, sec. 3, and cases cited in note 9; *Myer v. Railroad*, 2 Neb. 319; *Hagan v. Railroad*, 5 Phila. (Pa.) 179; *Hicks v. Railroad*, 64 Mo. 430; *McPheeters v. H. & St. Jo. Ry. Co.*, 45 Mo. 22, 24; *Frick v. Railroad*, 75 Mo. 595. (5) It is not the law that it is only when the injury sued for is alleged in terms or substance to have been wilfully committed that contributory negligence ceases to be a defence. *Hicks v. Railroad*, 64 Mo. 436; *Isabel v. Railroad*, 60 Mo. 480; *Maner v. Railroad*, 64 Mo. 267. (6) The pleadings in this case are the same as when it was here on a former appeal and the petition is sufficient to authorize the admission of plaintiffs' evidence and the giving of their instructions. *Mack v. Railroad*, 77 Mo. 232. (7) It was the duty of the engineer to keep a look out on the track. *Kelley v. Railroad*, 75 Mo. 140; *Frick v. Railroad*, 75 Mo. 595.

RAY, J.—This case has been once before in this court, and is reported in 72 Mo. 50. It was then re-

Bell v. The Hannibal & St. Joseph Railway Co.

versed and remanded for erroneous rulings upon instructions, and upon a subsequent trial in the circuit court again resulted in a verdict and judgment for plaintiffs, from which defendant appealed. The statement of the case in the former decision was based in part upon evidence introduced by the defendant, especially that of the engineer; but the defendant introduced no evidence on the trial, now under review. With this modification and qualification we deem it unnecessary to make any further statement as to the general facts of the case, and the circumstances under which the boy was killed.

The main grounds relied upon for a reversal of the present judgment grew out of the admission of the plaintiff, Jno. A. Bell, as a witness in the cause; the contributory negligence of the boy and the action of the court in giving and refusing instructions in regard thereto, and especially its said action in giving for plaintiff the following instruction number six:

"6. The jury are instructed that if they believe from the evidence that the engineer in charge of the train saw that the boy did not notice the approaching train, nor hear the alarm whistle, it was his duty to use every means in his power, consistent with the safety of his train, to stop or slack up the speed of his train, so as to prevent injury to the boy, and if he failed to so stop, or slack up the train, when he could have done so, but ran upon and killed the boy, then the jury are bound to find the verdict in favor of the plaintiffs, even though they may believe that the boy may have been improperly on the track, and may have been negligent in standing there without keeping a lookout for an approaching train."

I. As to the competency of John A. Bell as a witness, as he is a party jointly and equally interested with his wife (who is his co-plaintiff) in the judgment (R. S., 1879, sec. 2121), it is contended that he is disqualified from testifying by virtue of said marital relation, and

Bell v. The Hannibal & St. Joseph Railway Co.

that our statute (sec. 4010, R. S.) was only designed and intended to remove the disqualification of interest, and not that arising from the marital relation. This position is, at least, a plausible one, and the question presents, we think, some serious difficulties in its solution. Our conclusion, however, is against the view presented by appellant's counsel. The reason of the disqualification of husband and wife, at common law, was, we think, two-fold. Where they were offered for each other they were excluded on the ground of their identity of interest, and where they were offered as witnesses against each other they were likewise excluded, on the ground of public policy. *Fugate v. Pierce*, 49 Mo. 444; *Southwick v. Southwick*, 49 N. Y. 510. Blackstone places this prohibition under consideration upon the ground of interest, and also, upon the ground of the unity of the person. 1 Bl. Com. 443. But there are many authorities, and they are cited by appellant, which place it, either mainly, or solely, upon the ground of public policy; and which fully sustain the appellant's positions. But in *Steffen v. Bauer*, 70 Mo. 399, 404, 405, which was a controversy over land, the title to which was in the wife, Steffen, the plaintiff, and the husband, was offered as a witness, to show that his wife signed the deed under compulsion, and acknowledged the same while he was present. The objection that he was incompetent because he was the husband was made, and in the circuit court he was allowed to testify upon the issues affecting his interest alone, but was excluded upon the issue challenging the trust deed, which issue was supposed to chiefly affect the wife's interest. After noticing the abolishment, by our statute, of several rules of evidence established by common law and the frequent difficulty of our determining the extent thereof, and declaring that Steffen, husband and plaintiff, was clearly competent, as to his own interests, the court, through Napton, J., then say: "It is obvious * * * that he

Bell v. The Hannibal & St. Joseph Railway Co.

had an interest in the issue as well as his wife, since in the event of her death he would be tenant by the curtesy, and, also had an interest in his wife's land during coverture. * * * The husband, therefore, cannot testify for the wife, on this issue concerning the validity of the trust deed without also testifying for himself, to the extent of his interest. It strikes me, therefore, that the distinction taken by the circuit court * * * is not authorized under our statutes as they now stand."

And in the present case, the husband and plaintiff, John A. Bell, testifies in his own behalf, and, at the same time, testifies necessarily in his wife's behalf. He is not a nominal or technical party to the record. He is, equally with his wife, the meritorious cause of action, and had a like beneficial interest with her in the judgment, conferred upon them jointly by the statute. He was, we think, a competent witness under the law as it now stands, and this construction has been adopted, acquiesced in, and recognized in numerous decisions by this court, and is the one which best accords, we think, with the obvious intent and purpose of our statutes. *Fugate v. Pierce, supra*; *Steffen v. Bauer*, 70 Mo. 404; *Cooper v. Orr*, 60 Mo. 420; *Haerle v. Kreihn*, 65 Mo. 202; *Buck v. Ashbrook*, 51 Mo. 539; *Joice v. Branson*, 73 Mo. 29; *Wood v. Broadley*, 76 Mo. 23. The statute may be said to be an expression, and there are many such in our law, civil and criminal, of a modern public policy, changing and abrogating the common law rules of evidence in many and important particulars, and advancing public justice and convenience by allowing and admitting relevant evidence heretofore incompetent, and leaving its credibility and value to be passed upon, and determined as a fact.

II. As to the court's ruling upon instructions, it is conceded that those given for the plaintiff are, for the most part, the same as upon the former trial, and this is

Bell v. The Hannibal & St. Joseph Railway Co.

further seen and shown by a comparison of the same, as set out in the record, and those set out in the report of the case in 72 Mo. 50. The second omits the word unskillfulness, whose use therein was criticised by this court in its former opinion. In the former decision of the case, instruction numbered seven in the report thereof was declared correct, if the words "by any means in his power" had been qualified by adding "consistent with the safety of the train." Instruction now numbered six contains the words and qualification thus suggested, and is, in all other respects, substantially the same as said instruction formerly numbered seven. But it is now urged against the propriety of said instruction that it ignores Athen Bell's contributory negligence, and directs a verdict for plaintiff, notwithstanding the same, and that it announces a rule that can have no application to a case like this, where the negligence of the injured party, in the language of counsel, "continues up to and commingles with the negligent act of the defendant in producing the injury," and this view is put by counsel in many ways, and a great number of authorities are cited in support thereof. The conduct of young Bell, upon the occasion in question, in going upon the railroad track, when and where he did, and in failing to keep a lookout for passing trains, was, we think, grossly careless and negligent, and such it was held and denominated in the former decision of this case. While this is so, yet, if it is also true that, after the engineer discovered the boy upon the track, under the perilous circumstances stated in the instruction, he could, by the use of every means in his power consistent with the safety of the train, have avoided the injury to the boy, then the defendant is liable, whatever may have been the boy's antecedent negligence in going upon the railroad, or in being there at the time. On this state of facts, the instruction might properly authorize a verdict, for the doctrine of contributory negligence, is then, we think,

Bell v. The Hannibal & St. Joseph Railway Co.

wholly inapplicable, and it does not then exist as a defence.

The boy's negligence does not, in that event, as counsel argues, "continue up to, commingle and cooperate with the defendant's negligence in producing the result." It has ceased to operate, whenever the engineer discovers his peril and has present ability to prevent the injury. These new elements of time, opportunity, and ability to render the boy's negligence harmless, create the duty to do so, and where the power to do this exists, and a failure to employ it occurs, then the injury is, in legal contemplation, to be attributed thereto, and although the boy's negligence may have existed, and may have been present at the time, yet it is not then present as a cause of the injury, or as actively contributing thereto, for the injury could have then been avoided, notwithstanding such negligence. This failure to use the means possessed at the time, and adequate to prevent the injury, is, we think, what the books and authorities denominate, in that event, the direct and proximate cause of an injury, and the boy's negligence is, under the state of facts supposed, an extinct and inactive and inoperative agency or condition in the transaction. If these views of the law are correct, and there was evidence to show the existence of the facts, as submitted, then it follows that the instruction was proper and the giving thereof was not erroneous.

Assuming that the engineer was at his post, and observant of the track, as it was his duty to be, when running his train at such a rate of speed through the station at the town of Meadville, and without intending to stop thereat, the evidence shows that the boy could have been seen by the engineer for the distance of two hundred yards, and perhaps farther. In the absence of his testimony, the exact time when he did, in fact, see the boy on the track, his distance from the engine, and

Bell v. The Hannibal & St. Joseph Railway Co.

the means thereafter used by him, if any, to avoid the injury, must be learned, if at all, from the plaintiffs' witnesses, and the admitted and necessary facts, circumstances and surroundings attending the transaction. That the engineer was aware of the boy's presence upon the track and of his thoughtless condition at the time, or, at least, of his dangerous situation, is plainly shown, or may, at least, be plainly inferred from the fact that the alarm whistle was sounded by him, which was done at a distance from the boy of one hundred and sixty or two hundred feet. The opportunity and ability of the engineer to prevent the injury, and the exertions, if any were made to do so, were, under the circumstances of this case, matters for the consideration and determination of the jury. In the former opinion in this case Napton, J., speaking for the court, says, "the evidence shows, that everything was done by the engineer, when he ascertained that Athen Bell did not move at the alarm whistle, except to reverse the engine, and the question is, whether the engineer, in simply applying the air brakes, and not reversing the engine, is to be regarded as justified by the circumstances, on the ground that he acted on his judgment which, whether right or wrong, had to be formed instantaneously."

The jury did not have the benefit of the engineer's evidence upon this trial, as to whether or not he reversed the engine and applied the brakes, or as to how promptly he gave the signal, and used, if at all, the means and appliances under his control to prevent the injury, or of his explanation as to why he did not, if he failed to do so, but there was, we think, evidence by plaintiffs' witnesses, who were bystanders at the station and passengers on the train, and facts and circumstances from which they could find or infer that the engine was not reversed, or the speed slackened until the boy was struck, and that all the means of stopping the train and avoiding the injury were not used, as promptly, at least,

Bell v. The Hannibal & St. Joseph Railway Co.

as they might and should have been, under the circumstances. There was, we think, evidence of the facts submitted in said sixth instruction, and it was for the jury to give it such weight and value as they might think proper. The further objection to said instruction, that the pleadings did not raise the question of negligence after becoming aware of the danger in which the deceased was placed, is not, we think, well taken. It is raised, for the first time, in this court.

The action was brought under the second section of the damage act, for the death of the son, caused by the negligence and carelessness of defendant's agents and servants in running, conducting and managing the train and in failing to give signals of its approach. The second amended answer was a general denial of the allegations of the petition and charged contributory negligence on the part of Athen Bell, and alleges further as follows: "That defendant, by its agents and employes, conducting, managing and running said engine and train, had the same under full control, and exercised reasonable care and diligence in the management thereof, before, and at the time of Athen Bell's getting struck, as aforesaid, in order to prevent the same, and they could not, by the exercise of reasonable care and diligence, prevent striking and injuring him, as alleged in said petition."

That question, then, was, we think, raised by these pleadings and was, we think, necessarily involved in the issues thus made, and, further, it is evident that this was the theory of the defendant, in the trial below, as shown by instructions numbered two, three and four, given at his instance and in his behalf. The remaining criticisms of counsel upon the other instructions in this case, are, we think, without substance and merit. The instructions, four in number, given on the part of the defendant, with those given for the plaintiff, fairly presented the questions at issue to the jury. We see no error in

Bell v. The Hannibal & St. Joseph Railway Co.

the court's action thereon, or in the record, and we, therefore, affirm the judgment.

On re-hearing.

KAY, J.—This cause has been re-argued and upon a reconsideration of the whole case my associates are of opinion that the death of the boy was occasioned directly and solely by his gross carelessness in going and remaining upon the railroad track without looking or listening for the approach of the train, and that there is no evidence in the record that the servants or employes of defendant in charge of the engine and train could have avoided the injury, after discovering the perilous position of the boy; or that upon the discovery of his presence and peril upon the railroad track they failed or omitted to use any of the means in their power to avoid and prevent the accident. They, therefore, hold that the instruction, in the nature of a demurrer to the evidence, asked by defendant at the close of plaintiffs' evidence, should have been given. This conclusion leads to a reversal of the judgment of the circuit court, which is ordered accordingly. I am unable to concur in this view and estimate of the evidence and, therefore, dissent from the above result and disposition of the case. I adhere to the views heretofore expressed in the original opinion in this cause.

Snyder v. The W., St. L. & P. Ry. Co

SNYDER V. THE WABASH, ST. LOUIS AND PACIFIC RAIL-
WAY COMPANY, *Appellant*.

Tort to Property: ASSIGNABILITY OF ACTION FOR: CODE. A right of action arising from a tort to property is assignable under the code (overruling *Wallen v. Ry.*, 74 Mo. 521).

Appeal from Daviess Circuit Court.—HON. JOHN C.
HOWELL, Judge.

AFFIRMED.

W. H. Blodgett and G. S. Grover for appellant.

(1) It is not averred in the statement in what township the animal was killed. Nor does it appear in what township F. Ewing was justice of the peace. These defects are jurisdictional and it was error to permit any evidence to be introduced in the case. *State v. Metzger*, 26 Mo. 65; *Hansberger v. Ry.*, 43 Mo. 200; *Iba v. Ry.* 45 Mo. 475; *Haggard v. Ry.*, 63 Mo. 383. (2) The statement is fatally defective in not averring that the animal in question got upon defendant's track at a point which was not fenced, as required by law, and was there killed in consequence of such failure to fence. It is averred that the animal got upon defendant's track by reason of the failure to fence, but where is not stated. This is an essential fact and must be pleaded in order to state a cause of action under section 809 of the statute. And this statement is not good under any other section of the statute, or at common law. *Johnson v. St. L., K. C. & N. Ry.*, 76 Mo. 554. and cases cited; *Cooper v. St. L., I. M. & S. Ry.*, — Mo. —; *Mayer v. Union Trust Co.*, — Mo. —; *Nance v. Ry.*, 79 Mo. 196. (3) The plaintiff here is not the real party in interest, and, therefore, was not entitled to recover. The cause of action was vested

Snyder v. The W., St. L. & P. Ry. Co.

in Pleasant Blakely and was not assignable. This principle is well settled in Missouri. Sec. 3462, R. S. Mo. 1879, p. 592; *Cable et al. v. St. L. M. Ry. & Dock. Co.* 21 Mo. 136; *Burnett v. Crandall*, 63 Mo. 416; *Wallen v. St. L., I. M. & S. Ry. Co.*, 74 Mo. 521. The case of *Smith v. Kennett*, 18 Mo. 154, on which respondent's counsel rely, is no longer authority, because the ruling there was under the practice act of 1849. Laws of 1849, sec. 1, art. 3, p. 75. That act contained in substance the first clause of section 3462 of the present statute, but did not contain the following proviso: "But this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." This proviso appeared for the first time in the revision of 1855. Stat. Mo. 1855, sec. 1, art. 2, p. 1217. And the cases we here cite were decided under section 3462 of the present statute.

Edwin Silver and *W. D. Hamilton* for respondent.

The code procedure was first adopted in New York in 1848. Pomeroy on Remedial Rights (2 Ed.) sec. 28. It has since been adopted in twenty-two other states and territories. In New York, Indiana, Kansas, Missouri, Wisconsin, Florida, South Carolina, Kentucky, Oregon, Nevada, Dakota, North Carolina, Washington and Montana the code provides: "Every action must be prosecuted in the name of the real party in interest. But this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." Pomeroy, section 124. This last clause was not in the code as originally adopted in New York in 1848, but was added in 1851. Voorhees N. Y. Code of 1852 (3 Ed.) 81 and 82. Since the amendment of 1851, adding the words "but this section shall not be deemed to authorize the assignment of a thing in action not arising on contract," it has been uniformly held by the

Snyder v. The W., St. L. & P. Ry. Co.

court of appeals of New York that injuries to property are assignable as before the amendment. *McKee v. Judd*, 2 Kernan, 622; *Zabriske v. Smith*, 3 Kernan, 322, 1855; *Butler v. Ry.*, 22 Barb. 110, 1856; *Fried v. Ry.*, 25 How. P. 285, 1858; *Byxbie v. Gould*, 24 N. Y. 667, 1862; *Graves v. Spier*, 58 Barb. 386, 1870; see Pomeroy on Remedies, secs. 144, 145, 146, 147, and note, 148, 149, 150 and 151; Bliss on Code Pleadings, secs. 40, 41, 42, 43; Van Santvoord's Code Pleadings, 110, 111. Same doctrine is also held in Wisconsin, Kansas, and California. *McArthur v. Canal Co.*, 34 Wis. 152-3; *Stewart v. Balderston*, 10 Kan. 131; *Lazard v. Wheeler*, 22 Cal. 141. See Code of Kansas of 1868, 685, and of 1879, 604, which are like ours. The case of *Wallen v. Ry.*, 74 Mo. 521, should be overruled for the following reasons: (a) It was decided without any brief having been filed for respondent. (b) The provision of our practice act here involved was adopted into our Revised Statutes of 1855, from the code practice act of New York of 1849, as amended in 1851. See *supra*. It is a well settled principle, that when a statutory provision of another state is adopted, it is so adopted with the judicial construction of the same up to that time. *Skouten v. Wood*, 57 Mo. 380. Our practice act of 1855 was approved December 12, 1855, and went into effect May 1, 1856. See Revised Statutes, 1855, p. 1302 and p. 1026, sec. 18, and the cases of *McKee v. Judd*, 3 Kernan, 622, and *Zabriske v. Smith*, 3 Kernan, 322, were decided before the taking effect of the practice act here in 1856, and, therefore, are controlling decisions in respondent's favor, on the point here presented. (c) The doctrine of the *Wallen case*, and of the opinion of the court in the case at bar, stand alone, being in conflict not only with the decisions of the court of appeals in New York, but elsewhere, where the point has been passed on, viz: in Wisconsin and Kansas and California; and is also in conflict with the opinion of text writers of such reputation and merit as Judge

Snyder v. The W., St. L. & P. Ry. Co.

Bliss, Prof. Pomeroy and Mr. Van Santvoord. See *supra*. (d) Because the doctrine of the *Wallen* case is in conflict with the meaning and intent of section 96, Revised Statutes, 1879, which has been in force in this state since 1835. See Revision of 1835, art. 2, sec. 24, of administration. This same provision, in same form, has been for a long time in existence in New York and other states, and it has been held uniformly under it, that property wrongs surviving to executors are assignable. See Pomeroy on Remedies, sec. 147, note 1. Also New York decisions above cited.

NORTON, J.—The first question presented by the record in this case is, whether a cause of action arising out of defendant's failure to erect and maintain lawful fences along the sides of its road, whereby a hog of the value of eight dollars was killed, can be assigned so as to give the assignee a right to sue in his own name. This question was answered in the negative by this court in the case of *Wallen v. The St. Louis, Iron Mountain & Southern Railway*, 74 Mo. 521, when it was held that section 3462, Revised Statutes, forbids the assignment of a thing in an action, not arising out of contract. In this case we are asked to reconsider the question and to recede from the doctrine announced in the case above cited. According to the authorities to which we have been cited, the test to be applied in determining the assignability of causes of action is whether the cause of action would survive and pass to the personal representatives of a decedent. If it would, it is transferable by the direct act of the parties. If it would not, it is not assignable.

Mr. Pomeroy, in his work on Remedies and Remedial Rights (sec. 147), lays the rule down as follows: "It is fully established by a complete unanimity in the decisions, that causes of action which survive and pass to the personal representatives of a decedent as assets,

Snyder v. The W., St. L. & P. Ry. Co.

or continue as liabilities against such representatives, are in general assignable. By the common law, causes of action arising out of contract, unless the contract, being still executory, was purely personal to the decedent, or unless the injury resulting from its breach consisted entirely of personal suffering, bodily or mental, of the decedent, did thus survive; while causes of action arising out of torts did not, in general, survive. The statutes, in most, if not all the states have changed this ancient rule, and have greatly enlarged the class of things in action which survive. It is now the general American doctrine, that all causes of action arising from torts to property, real or personal—injuries to the estate, by which its value is diminished, do survive and go to the executor or administrator as assets in his hands. As a consequence, such things in action, although based upon a tort, are assignable." See also sections 146, 148, 149, 150.

That the cause of action in this case would have survived to the personal representatives of the owner of the hog alleged to have been killed by defendant cannot be questioned in view of section ninety-six of Revised Statutes, which provides that "for all wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, * * * or after his death, by his executor or administrator in the same manner and with the like effect in all respects as actions founded on contract." It is further provided in section ninety-seven, that the above quoted section shall not extend to actions for slander, libel, assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator.

It is claimed by defendant's counsel that the assignability of a thing in action, arising out of a tort for

Snyder v. The W., St. L. & P. Ry. Co.

injury to real or personal property is denied by section 3462, Revised Statutes, which is as follows: "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the next succeeding section; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." The last clause in the above section was added to it as an amendment in 1855, and took effect on the first day of May, 1856. At the time the amendment was adopted the code of New York contained a section in precisely the same words as are to be found in said section 3462; and previous to the adoption of the amendment, it was held by the court of appeals of New York, in the cases of *McKee v. Judd*, 2 Kernan, 622, and *Zabriskie v. Smith*, 3 Kernan, 322, that a cause of action which would survive to the personal representatives can be transferred and enforced in the name of an assignee. It follows from the ruling made in the case of *Skouten v. Wood*, 57 Mo. 380, that section 3462 was adopted with the construction given to it by the courts of New York. It is said in that case: "That the construction of the act given by the courts of the state or country in which it originated would be very persuasive, if not conclusive evidence, that our legislature in adopting it meant to adopt it as construed by the judicial authorities of the state where it originated." So in the case of *Butler v. The New York & Erie Ry. Co.*, 22 Barb. 110, where a suit was brought by the assignee of a cause of action against the railroad company for negligently running over and killing a yoke of oxen, the court held that the action was maintainable in the name of the assignee, and in the disposition of the cause it is observed, "that the one hundred and eleventh section of the code requires that every action must be brought in the name of the real party in interest; but by an amendment of the section in 1851, it is declared 'that this section shall not be deemed to authorize the assignment

Snyder v. The W., St. L. & P. Ry. Co.

of a thing in action not arising out of contract.' Before this section was amended in 1851, by adding the above restriction, it was held that in the class of cases where the right of action for a tort affected the property of the party, the right of action was assignable, so as to enable the assignee, under section 111 of the code to sue in his own name. This amendment to section 111 has been supposed by some as intended to restrict this right, and to establish the general principle that nothing but a cause of action growing out of contract could be assigned so as to give the assignee such an interest as would enable him to enforce his demands by civil action. I do not see how any such construction can be given to this amendment. It is true, it does not authorize the assignment of a thing in action not arising out of contract. Nor does it forbid such an assignment. The right rests precisely on the same footing as it did before, and an assignee takes precisely the same interest in the assignment of every species of demand as he did before the code. It follows, therefore, that if the demand was such as was capable of assignment before the code, so as to carry an equitable interest to the assignee, it is such a demand as will now pass by assignment so as to give the assignee a right of action therein."

The same doctrine is announced in the following case: *Fried v. Ry.*, 25 How. 285. The same rule has been announced in Wisconsin and Kansas, in both of which states a provision, worded in the exact language of section 3462, Revised Statutes, is to be found in their codes of practice. See *McArthur v. Canal Co.*, 34 Wis. 152, 153. In the thirty-eighth section of Bliss on Code Pleading it is said: "The section of the statute requiring the action to be brought in the name of the real party in interest, closes with this proviso: 'But this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract;' which can only be understood as guarding against the infer-

Snyder v. The W., St. L. & P. Ry. Co.

ence that the section authorizes the assignment of rights of action arising from torts, which were not before assignable. The matter is left as before, and the proviso seems to be without legal effect." Van Santvoord's Pleading, 111, is to the same effect. It was held by this court, in the case of *Smith v. Kennett*, 18 Mo. 154, that a right of action for the conversion of property may be assigned under the code so as to enable the assignee to sue in his own name.

The cases of *Cable et al v. Ry. & Dock Co.*, 21 Mo. 133, and *Burnett v. Crandall*, 63 Mo. 416, to which we have been cited by defendant's counsel, have no bearing on the question in hand, as in both of them the question involved was whether it was permissible for a party to split his cause of action by assigning part of it, and it was simply held that he could not. In view of what has been said, we must answer the interrogatory propounded in the beginning of this opinion in the affirmative, and hold that the proviso added, by way of amendment in 1855 to section 3462, neither forbade the assignment of causes of action arising in tort, for such injuries to property as survived to the personal representative, nor authorized the assignment of such causes of action arising in tort, which did not survive to such representative, but died with the person, and that, in so far as the opinion in the case of *Wallen v. The St. Louis, Iron Mountain & Southern Ry.*, 74 Mo. 521, conflicts with what is here said, it is overruled.

We think the statement made is sufficient and that the case was fairly tried. All concur, except Judge Henry who dissents.

HENRY, C. J., DISSENTING.—In *Smith v. Kennett*, 18 Mo. 154, decided in 1853, it was held that a right of action for the conversion of personal property was assignable, and that the assignee might sue in his own name; but that a chose in action for injuries to the

Snyder v. The W., St. L. & P. Ry. Co.

person was not assignable. The statute then in force provides that: "Every civil action must be prosecuted in the name of the real party in interest except as otherwise provided in the next succeeding section." And that next section excepted an administrator, a trustee of an express trust, and a person expressly authorized by statute to sue. In 1855, within two years after the decision above referred to, the statute was amended as follows, and so it has remained ever since: "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the next succeeding section; *but this section shall not be deemed to authorize the assignment of a thing in action, not arising out of contract.*" What is the meaning of the last clause? It applies, whatever its meaning may be, to all causes of action not arising on contract, as well as those recognized as assignable in *Smith v. Kennett*, as to those based upon injuries to the person, decided in that case to be non-assignable. It is manifest that the first clause of the section never was susceptible of a construction which would authorize the assignment of a right of action for personal injuries, much less the right of an assignee of such a thing in action to sue in his own name. Who that is capable of construing the simplest English sentence, knowing what was decided in *Smith v. Kennett*, would construe, as authorizing the assignment of a right of action not by law assignable, the requirement, "all actions shall be prosecuted in the name of the real party in interest?"

That section, before the amendment, only operated upon cases in which the right of action was then assignable, and if one as assignee had, under the statute of 1849, for a personal injury to another, is it not too clear to admit of argument that he could not have sustained the action? The amendment which is, in effect, a proviso, means that no chose in action, not arising out of contract, shall be assignable, or that a right of action

Snyder v. The W., St. L. & P. Ry. Co.

not arising out of contract should not be prosecuted in the name of an assignee. It means one or the other, or it is a meaningless superfluity. I am not inclined to construe it as forbidding the assignment of things in action, recognized as assignable in *Smith v. Kennett*. Nor was it so held in *Wallen v. Ry.*, 74 Mo. 521. We must, if possible, give effect to the proviso, and not impute to the general assembly the use of language in a solemn enactment, an entire proviso, having no significance whatever. It is not one of those inaccuracies which sometimes occur in original bills, but the clause in question is an amendment to a section prescribing in whose name suits should be prosecuted, and it must be construed with reference to the general scope and purpose of the section. The first clause manifestly embraced all rights of action arising out of contracts, and all actions for torts then assignable; and if the intent and purpose of the proviso was merely to exclude from the operation of the first clause, causes of action arising out of injuries to the person, which we have seen this court had before held were not included, the idea could have been expressed in fewer words than are contained in the amendment. Our view is strengthened by the fact that the amendment was adopted recently, after the decision in *Smith v. Kennett*, and by the additional consideration that assignments of rights of action for torts are of a champertous nature, and against public policy, as was held in *Oliver v. Walsh*, 6 Cal. 458; *Young v. Ferguson*, 1 Litt. (Ky.) 298; *McGoon v. Ankeny*, 11 Ill. 558; *Dunklin v. Wilkins*, 5 Ala. 200; *Goodwyn v. Loyd*, 8 Porter, 237; *Overton v. Williston*, 31 Pa. St. 155; *Brown v. Bipscomb*, 9 Port. 472; 4 Blackstone's Com. 135.

Decisions of the court of New York have been cited which place a different construction upon the clause in question in their statute, but when the case of *Wallen v. Ry.* was decided, we were not aware that the courts

The State v. Jones.

of that state had placed a different construction upon their statute, and having correctly construed our own, I am not inclined to abandon that construction and adopt one which I think erroneous. I think the meaning of the statute is as above stated, and that, so interpreted, it is a wise and salutary law, preventing sharpers and champertors from roaming about buying up claims for damages to property at a heavy discount, and prosecuting suits for injuries, which, but for their interference, might have been compromised. When *Wallen v. Ry.*, *supra*, was before us, those adjudications were not cited, nor were we aware that such decisions had been rendered. The case of *Wallen v. Ry.* was followed in a subsequent case, and having twice announced what I am satisfied is the true construction of our statute, I think we should adhere to it, however we might have held in the first instance if our attention had been called to the decisions above referred to. The proviso in question is sheer nonsense, if it does not mean what we held that it meant, in the two cases heretofore decided by us, and to hold otherwise is to attribute to the general assembly, which enacted it, gross ignorance, and to eliminate from the statute an entire proviso adopted as an amendment.

THE STATE V. JONES, *Appellant*.

1. **Criminal Law : PLEADING : PRACTICE : EVIDENCE.** An indictment for felonious assault, under Revised Statutes, section 1262, and a series of instructions applicable to that offence approved, and the evidence in the case held sufficient to sustain a conviction.
2. ——— : **PRACTICE : INSTRUCTIONS.** In a prosecution for felonious assault, under Revised Statutes, section 1262, where the evidence shows that grade of offence, it is not error to refuse to instruct that

The State v. Jones.

the defendant may be awarded a less degree of punishment than imprisonment in the penitentiary.

Appeal from Oregon Circuit Court.—HON. J. R. WOODSIDE, Judge.

AFFIRMED.

The indictment in this case, omitting the formal part, is as follows :

“In and upon one Leonard Allen feloniously, on purpose, and of his malice aforethought, did make an assault, and did then and there, on purpose, and of his malice aforethought, feloniously shoot him, the said Leonard Allen, in and upon the back of him, the said Leonard Allen, with a certain pistol, loaded with powder and leaden balls, which he, the said Price Jones, then and there held in his right hand, with intent then and there him, the said Leonard Allen, on purpose, and of his malice aforethought, to kill and murder, against,” etc.

The testimony showed substantially the following facts: On the twenty-fourth of December, 1881, the defendant went to Mammoth Spring, in Oregon county, where he bought cartridges and loaded his pistol. Later in the same day, while at his brother's house, he was heard to say that “Leonard Allen was trying to beat him out of his girl, and if Allen tried it that night, he (defendant) intended to beat him.” At a dance at his brother's, on the night of the same day, defendant examined his pistol, revolved it so that the hammer would strike upon a cartridge, and, twenty or thirty minutes later, entered the room where the dancing was in progress, and shot Leonard Allen, cutting a hole in his clothing and abrading the skin upon his back. Allen was, at the time of the shooting, talking to the young lady referred to by defendant in his remark made during the day.

The State v. Jones.

Defendant was under the influence of liquor at the time of the shooting, was boisterous and abusive, and attempted, after he fired, to get to Allen to fight him, but was prevented from doing so, and taken from the room.

The court gave the following instructions for the state:

"1. The court instructs the jury that if they believe from the evidence that the defendant, at the county of Oregon, and state of Missouri, within three years next before the finding of the indictment, did feloniously, on purpose, and of his malice aforethought, shoot Leonard Allen with a certain pistol, with intent to kill him, the said Leonard Allen, they should find him guilty, and assess his punishment at imprisonment in the penitentiary for a period of not less than two years, nor more than ten years."

"2. The court instructs the jury that the words on purpose, and of his malice aforethought, as used in the indictment, mean the intentional doing of a wrongful act, without just cause or excuse."

"3. The court instructs the jury that the prosecution has admitted that George Allen, a witness for defendant, would, if present, make a certain statement (as read to the jury), as his evidence in the case, but it is not admitted that the same is true, but only that he would so swear if he were present."

"4. The court instructs the jury that they are the sole judges of the testimony and of the weight thereof, and of the credibility of the witnesses, and if the jury believe that any witness has made any wilful false statement, or sworn wilfully false to any material fact, they should disregard the whole of said witness' testimony, and in arriving at the credibility of witnesses, they may take into consideration the fact that witnesses for defendant are his relatives."

The State v. Jones.

"5. The jury are instructed that all persons are presumed to intend the natural and probable consequences of their own acts. Hence, if the weapon be such and so used as probably to produce death, the inference is that death was intended."

"6. The court instructs the jury that if they entertain a reasonable doubt as to the guilt or innocence of defendant, they should acquit, but a doubt to authorize an acquittal, must be a real, substantial doubt, arising out of a due consideration of all the testimony, and not a mere conjecture or possibility of the defendant's innocence."

The court gave the following instructions, at the request of the defendant:

"1. The court instructs the jury that although they might believe from the evidence that the defendant shot yet, unless they further believe from the evidence he shot said Leonard Allen with intent to kill, they should find him not guilty."

"3. The court further instructs the jury that the defendant came into court with the legal presumption of innocence in his favor, and that presumption maintains throughout the entire trial of the cause, until overcome by competent evidence, which should be of such a convincing character as to force the minds of the jurors to no other reasonable conclusion than that of the guilt of the defendant, or their verdict should be not guilty as charged."

"4. The court instructs the jury in this case that they are the sole judges of all the evidence and facts in this case, as well as of the credibility of the witnesses, and that it devolves upon the prosecution to make out every material allegation charged in the indictment necessary to a conviction, by competent evidence, beyond a reasonable doubt, before they would be warranted in returning a verdict of guilty, and that if you have a reasonable

The State v. Jones.

doubt as to who fired the shot charged in the indictment, your verdict should be not guilty."

"7. The court instructs the jury that unless they believe from the evidence that the defendant did the shooting as charged in the indictment, within three years before the finding thereof, they should find the defendant not guilty."

"9. The court further instructs that the defendant comes into court with the legal presumption of innocence in his favor, and that presumption maintains throughout the entire trial, until overcome by competent evidence; and that although they may believe from the evidence that there were a number of shots fired at or in the house of John Jones, on the night of the dance, yet if they have a reasonable doubt as to who fired the shot complained of in the indictment, they should acquit the defendant, although they may believe that Price Jones fired his pistol, also; for, before they would be warranted in convicting the defendant, they should be satisfied from the evidence that the defendant shot at Leonard Allen with a felonious intent at the time to kill and murder him, the said Allen, or to do him some great bodily harm, and unless you so believe, your verdict should be not guilty, as charged."

No brief for appellant.

B. G. Boone, Attorney General, for the state.

SHERWOOD, J.—The indictment in this cause is framed on section 1262, Revised Statutes, 1879, and charges an assault with intent to kill, made with a pistol. On being tried, the defendant was found guilty, and his punishment assessed at two years imprisonment in the penitentiary. The defendant is not represented in this

The State v. Jones.

court by counsel, but in discharge of the duty imposed by the statute, we have carefully examined the record and find no error therein.

I. The evidence abundantly establishes the charge contained in the indictment of a felonious assault with an intent to kill, and it is plain from that evidence that it was no fault of the defendant that his murderous purpose was not accomplished when he shot Allen.

II. The indictment is in all respects sufficient, and conforms to the section of the statute on which it is bottomed.

III. The instructions given on behalf of the state, and those on the part of the defendant, fully embraced all the law of the case, and there was no error in failing to instruct that the defendant might be awarded a less degree of punishment than that of imprisonment in the penitentiary. The section already referred to fixes the punishment at imprisonment in the penitentiary for a period not exceeding ten years, and this settles the matter. This view is also confirmed by section 1263, which prescribes the punishment to be inflicted in cases not provided for in section 1262.

Holding these views, the judgment must be affirmed. All concur, except Henry, C. J., who dissents.

HENRY, C. J., DISSENTING.—The second instruction given for the state I think erroneous, and, therefore, do not concur in the foregoing opinion.

Hines v. The Missouri Pacific Railway Company.

HINES V. THE MISSOURI PACIFIC RAILWAY COMPANY,
Appellant.

Railroads : DOUBLE DAMAGE ACT, CONSTITUTIONALITY OF. The former decisions of this court, upholding the constitutionality of the double damage act, as regards both the constitution of this state and of the United States, sustained.

Appeal from Barton Circuit Court.—HON. CHARLES
G. BURTON, Judge.

AFFIRMED.

Smith & Krauthoff for appellant.

Robinson & Harkless for respondent.

PER CURIAM.—This suit originated in the circuit court of Barton county, and is for the recovery of double damages for the alleged killing of plaintiff's cow, by a train of defendant's cars. A trial of the cause resulted in a judgment for plaintiff for double damages, and defendant has prosecuted an appeal to this court, urging a reversal of the judgment on the ground that the section of our law allowing the recovery of double damages against a railroad corporation for stock killed or injured, in consequence of the company's failure to fence its road, is in conflict with section 20, article 2; section 30, article 2; section 53, article 4, and section 8, article 11, of the constitution of this state. These questions have been passed upon by this court, and the constitutionality of said law upheld, and we adhere to the ruling in those cases. *Barnett v. A. & P. Ry. Co.*, 68 Mo. 56; *Cummings v. St. L., I. M. & S. Ry. Co.*, 70 Mo. 570; *Speelman v. Mo. Pac. Ry. Co.*, 71 Mo. 434.

Crisp v. Crisp.

It is also contended that said section is in conflict with section 1, article 14, of the amendments to the constitution of the United States, which declares that no state "shall deny to any person within its jurisdiction the equal protection of the laws." The point is made in the brief of counsel for appellant; but we are not favored with their views on the subject. All that is said in the brief is that: "The equal protection of the laws to any one implies that he has the right to resort, on the same terms with others, to the courts of the country for the security of his person and property." It may be admitted that this is what is meant by the phrase, "equal protection of the laws," but we do not perceive wherein the section under consideration contravenes the constitutional provision giving it that interpretation.

The judgment is affirmed.

CRISP, Plaintiff in Error, v. CRISP.

1. **Homestead, Failure of Officer to Assign : SALE NOT VOID.** The failure of a sheriff, selling, under execution, land which contains a homestead, to assign such homestead to the debtor does not render the sale void.
2. ———. The court may, in ejectment brought for the premises by the purchaser at the sale, cause the homestead to be assigned.

Error to Johnson Circuit Court.—HON. N. M. GIVAN,
Judge.

AFFIRMED.

S. P. Sparks for plaintiff in error.

- (1) It is essential to the validity of a sale on execu-

Crisp v. Crisp.

tion of premises containing a homestead, to set out the homestead before the sale. 2 Wag. Stat., chap. 68, p. 697; *Perkins v. Quigley*, 62 Mo. 498; *Vogler v. Montgomery*, 54 Mo. 577; Thompson on Homesteads, secs. 639, 640. (2) The life estate of the plaintiff would support her homestead claim. 1 Am. Law Reg. (N. S.) 652; *State ex rel. v. Diveling*, 66 Mo. 375.

John J. Cockrell and Comingo & Slover for defendant in error.

(1) Plaintiff's right of homestead became fixed upon her husband's death, and is not affected by a subsequent change of the statute. *Register v. Kensly*, 70 Mo. 189. (2) The plaintiff claims under the will and not under the law, and she must stand or fall by her testamentary title. *Bryant's Adm'r v. Bedford*, 49 Mo. 596; *Dougherty v. Barnes*, 64 Mo. 159; *Casebolt v. Donaldson*, 67 Mo. 308. (3) By voluntarily yielding possession to Roberts, and her neglect for some ten years to institute proper proceedings to establish her rights to a homestead in the property, the plaintiff is estopped and ought not to recover. *Bliss v. Prichard*, 67 Mo. 181. (4) If the plaintiff had a homestead right in the property, then, after the sale on execution against her, she was a tenant in common with the purchaser at such sale (Thompson on Homestead, sec. 630), and partition would lie. *Ib.*, secs. 631-34, 682, 712; *Spotts v. Wells*, 18 Mo. 471; R. S., 1879, sec. 2697, and G. S., 1865, p. 457, sec. 10.

BLACK, J.—This was ejectment for some six hundred acres of land. Greenville Crisp, plaintiff's husband, owned and resided on the land prior to 1861. In that year he went to the state of Texas, evidently designing to return as soon as he could with safety. He died there on the twentieth of December, 1865,

Crisp v. Crisp.

testate, and by his will devised the property in question to plaintiff for her life. In 1867, she returned with her minor children and took possession of these lands. In 1868, she and two of her sons incurred debts, for non-payment of which judgments were recovered against them, and these lands were levied upon and sold to Roberts on October 18, 1871. In 1877, Roberts conveyed them to defendant, another of plaintiff's sons. The sheriff failed to have a homestead assigned to her. The defendant at the second trial pleaded these matters, and asked that if the plaintiff should be found to be entitled to a homestead, that the same be set off to her. The court did so find, and appointed commissioners, who assigned to her one hundred and sixty acres, valued as of 1871, at fifteen hundred dollars; she also recovered possession of the one hundred and sixty acres, so set off to her, with agreed damages and all costs.

While the debts, to pay which these lands were sold, were the debts of the plaintiff, still she had a life estate in all of these lands. She was the head of a family, resided on the property, and was clearly entitled to a homestead under the first section of the act of 1865 (G. S., 1865, 648). That section exempts such homestead from attachment and execution. The second section gave her the right to designate and choose the part to which the exemptions should apply, and upon such designation and choice, or, in case of a refusal to designate or choose, it became the duty of the sheriff to appoint appraisers to set apart the homestead. This he failed to do.

While it was the duty of the officer to inform her of her right, and to have the homestead set off, whether she asked it or not, still does his failure so to do render the sale void? It must be conceded the authorities are not in entire harmony. Many of the cases relied upon by the plaintiff in error can hardly be regarded as having much bearing upon this question. It was held, in

Crisp v. Crisp.

Taylor v. Rhyne, 65 N. C. 530, that the sheriff was not bound to lay off a homestead, until his fees therefor were paid by the plaintiff in the execution, and, hence, could not be amerced for failure to make return to the writ, and in *Lambert v. Kinnery*, 74 N. C. 350, the property sold does not appear to have been in excess of the exemption. The real question there seems to have been whether the defendant had waived his exemption by reason of statements made at the sale. But, the same court in *Abbott v. Cromartie*, 72 N. C. 292, after stating, as it had before, that the homestead was not subject to levy and sale under execution, observed: "The sheriff's deed, therefore, could pass to the purchaser only what he had the right to sell, *i. e.*, the land, subject to the homestead estate." *Hartwell v. McDonald*, 69 Ill. 293, was ejectment, the question being, did the purchaser at the execution sale take any title, which, upon the subsequent abandonment of the homestead, he could assert against the defendant, who claimed by deed from the homestead claimant, subsequent to the execution sale, was without authority in law and of no validity. A different result was reached by the Supreme Court of the United States, in *Black v. Curran*, 14 Wall. 469, in the construction of the same statute. *Fogg v. Fogg*, 40 N. H. 282, was a possessory action. The property, in value, exceeded the exemption. The sheriff, though requested by defendant, declined to have the homestead set off, but extended the execution upon the whole property, and it was held the plaintiff could not recover.

But two cases decided by this court, *Vogler v. Montgomery et al.*, 54 Mo. 578, and *Perkins v. Quigley*, 62 Mo. 498, have any bearing upon the question now presented. In the first, it does not appear that the property was in excess of the exemption, either in quantity or value. In the second, it does not appear that the amount was less than one hundred and sixty acres. These cases are by no means decisive of the one at bar,

Crisp v. Crisp.

nor do they control its proper disposition. *Letchford v. Cary*, 52 Miss. 791, was ejectment brought by the purchaser at an execution sale against the homestead claimant, to whom no assignment of the homestead had been made, because of which it was contended the sale was void, but the court held otherwise, and that, of the two hundred and forty acres sold at the execution sale, plaintiff was, by reason of his purchase at that sale, entitled to recover all but one hundred and sixty acres, the amount of the exemption. See, also, 99 Mass. 10.

This property was, as we have seen, sold in 1871. Possession, it would seem, was yielded up to those claiming under the execution sale, except sixty acres which the plaintiff held by a different title, and of which the defendant was not in possession. For nearly ten years the defendant's title has not been questioned, and since his purchase he has made some improvements on the land. Both the sheriff and the plaintiff have acted in total ignorance of her rights. The circuit court was clearly right in holding that she was not estopped from demanding her exemption, and correctly held that the sheriff's deed was not void. The homestead law was designed to protect children as well as the head of the family. This should not be left out of view in the administration of the law. But it does not follow that this deed should be held to be void. To so hold, would be unjust and unreasonable, and a fair administration of the law does not demand it. A most liberal assignment was made in this case, and of which no complaint is or could rightfully be made. No question is made as to the propriety of the assignment of the homestead in this proceeding.

The judgment of the circuit court is affirmed. Sherwood, J., dissents. The other judges concur.

Covey v. The Hannibal & St. Joseph Railway Co.

THE STATE V. RHODES, *Appellant*.

Practice in Supreme Court: APPEAL. An appeal to the Supreme Court, which is not taken at the term final judgment is rendered, will be stricken from the docket.

Appeal from Dunklin Circuit Court. — HON. R. P. OWEN, Judge.

APPEAL DISMISSED.

Dennis & Fisher for appellant.

B. G. Boone, Attorney General, for the state.

PER CURIAM.—The appeal in this cause was not taken during the term, and, consequently, the cause is not here. It will, therefore, be stricken from the docket.

COVEY V. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Appellant*.

1. **Master and Servant: MACHINERY: NEGLIGENCE.** It is the duty of an employer to use reasonable and ordinary care and foresight in procuring appliances for the use of his servants, and in keeping the same in repair. But he is not required to furnish absolutely safe machinery, and what is reasonable and ordinary care depends upon the nature and character of the implement, and the dangers to be encountered in its use.
2. — : — : **DAMAGES.** The right of the servant to recover damages for injuries incurred in the use of defective machinery, depends upon proof that the injuries were so incurred, and that the

Covey v. The Hannibal & St. Joseph Railway Co.

master was aware of the defect, or that the use of reasonable care on his part would have disclosed the defect.

3. — : AGENT, KNOWLEDGE OF. Knowledge of defects on the part of the agents of the employer, who are intrusted with the duty of procuring machinery and keeping the same in repair, is to be attributed to the employer.
4. — : DUTY OF SERVANT : LATENT DEFECTS. While the servant is not bound to search for latent defects, he must take notice of those which are open to his observation, and of which he has knowledge, and if, with such information, he continues to use the implement, he does so at his own risk, as to injuries arising from such known defects.
5. **Practice : WEIGHT OF EVIDENCE : DEMURRER.** It is not the province of the court to determine the weight of the evidence, and where it is conflicting, a demurrer to the evidence, and instructions of a like character, are properly refused.
6. **Master and Servant : VICE-PRINCIPAL.** It is error to single out a servant upon whom none of the duties of the master, as to furnishing proper appliances and keeping the same in repair, devolve, and predicate a right to recover upon such servant's knowledge of defects, or his want of care.

Appeal from Macon Circuit Court. — HON. ANDREW ELLISON, Judge.

REVERSED.

Strong & Mosman, Smith & Krauthoff and George W. Easley for appellant.

(1) The master does not warrant to his servants absolutely the sufficiency or safety of the implements furnished for their work, but only for the exercise of reasonable care in that respect; and where an injury results to an employe from a defect in the implement furnished, knowledge of the defect must be brought home to the employer, or proof that he omitted the exercise of proper care to discover it. The burden is on plaintiff to prove the omission. *Booth v. Ry.*, 67 N. Y. 593; *De-Groff v. Ry.*, 76 N. Y. 125. Defendant must use reasonable and ordinary care in procuring implements and

Covey v. The Hannibal & St. Joseph Railway Co.

appliances for its servants' use. *Porter v. Ry.*, 71 Mo. 76. No well considered case holds the employer to a stricter liability. *Ib.* (2) An employer does not undertake absolutely with his employes for the safety or sufficiency of the implements furnished for their work, but only for the exercise of reasonable care in that respect, and when an injury to an employe results from a defect of the implement furnished, knowledge of the defect must be brought home to the employer, or proof given that he omitted the exercise of proper care to discover it. Negligence is the gist of the action. *Wright v. N. Y. Central Ry.*, 25 N. Y. 566; *Warner v. Erie Ry.*, 39 N. Y. 468-475; 80 N. Y. 46; *Murphy v. Boston & Albany Ry.*, 88 N. Y. 146; 54 Wis. 259; *DeGroff v. Ry.*, 76 N. Y. 125; *Hough v. Ry.*, 100 U. S. 213; *Frazier v. Ry.*, 38 Pa. St. 104; *Lanning v. Ry.*, 49 N. Y. 521; *Elliott v. Ry.*, 67 Mo. 272; Cooley on Torts, 557; *Long v. Ry.*, 65 Mo. 225. Proof that the employe was injured in consequence of the use of defective machinery will not, of itself, make out a case against the employer. It must be shown, also, that the employer was aware of the defect, or that by the use of reasonable care on his part it would have been discovered. *Elliott case, supra*; *Gibson v. Ry.*, 46 Mo. 166; *Dale v. Ry.*, 63 Mo. 453; *McDermott v. Ry.*, 30 Mo. 116; *Devitt v. Ry.*, 50 Mo. 305; Wood M. & S., sec. 411. There is no implied contract on the employer's part that he will "attend to those matters in person." Wood's Master and Servant, p. 897, sec. 452. There can be no recovery unless there is proof of neglect of some duty which the master owes to his servant. *McCroskee v. Ry.*, 84 N. Y. 77. There is an allegation that defendant knew the car handle was defective before the accident, but there is not the slightest attempt in the evidence to prove it. It remains wholly unproved. The law presumes that defendant had performed its duty in inspecting the implement, until the contrary is shown in evidence. Wood M. and S., secs. 346, 368; *Worner v.*

Covey v. The Hannibal & St. Joseph Railway Co.

Ry., 39 N. Y. 468. The fact that the car handle broke, did not, of itself, tend to overcome the presumption in the master's favor. (3) The instruction asked, that under the pleadings and evidence the verdict must be for the defendant, should have been given. Negligence cannot be presumed by the court or the jury. There must be some evidence. *Powell v. Ry.*, 76 Mo. 80, and cases cited. (4) It was error to submit to the jury in plaintiff's first instruction to find from the evidence whether defendant's car handles were accustomed to be repaired. It was error to submit to the jury whether defendant was ordinarily diligent and careful. There was no evidence of negligence. *Powell's case, supra*. *Prima facie*, it is presumed the master is not at fault. This presumption must be overcome by proof of fault on the master's part, that he knew, or should have known, of the defect. Wood on M. and S., sec. 368.

J. L. Berry for respondent.

(1) In selecting appliances and machinery for the servant's use, the master is bound to exercise reasonable and ordinary care and foresight. The master is presumed to know what the service is, and the dangers likely to be encountered, and must use such diligence and precaution as the exigencies of the service require. What is "ordinary care and caution" to be observed by the master, depends upon the character of the service. *Wabash Ry. v. McDaniels*, 107 U. S. 454; *Hough v. Ry.*, 100 U. S. 213. Respondent's instructions fairly presented this point to the jury. *Siela v. Ry.*, 82 Mo. 430. (2) Appellant was bound to use due care in keeping and maintaining the hand car in such condition as to be reasonably safe for respondent's use, considering the dangers of the service. This was for the jury to find. *Railroad v. McDaniels, supra*; *Lewis v. Ry.*, 59 Mo. 495; *Condon v. Ry.*, 78 Mo. 567, and authorities cited;

Covey v. The Hannibal & St. Joseph Railway Co.

Bran v. Ry., 53 Iowa, 595; *Ford v. Ry.*, 110 Mass. 240; *Gibson v. Ry.*, 46 Mo. 163; *Ellis v. Ry.*, Ohio L. J., Sept. 13, 1884. (3) Respondent had the right to assume that the machinery and appliances furnished him were safe and suitable for the business in which he was engaged, and was not required to examine or search to ascertain their fitness; but this the master was bound to do. The defect in this car handle was not patent, but should have been known to the company's agent, and could have been discovered by the exercise of such diligence as the company was bound to observe. *Condon v. H. & St. Jo. Ry.*, *supra*; *Porter v. H. & St. Jo. Ry.*, 71 Mo. 66, and authorities cited; *Porter v. same*, 60 Mo. 160; *Ford v. Fitchburg Ry.*, 110 Mass. 240.

BLACK, J.—The plaintiff, a carpenter, was in the employ of the defendant and was engaged in repairing bridges. He and his co-laborers had furnished to them a hand-car, which they used in transporting themselves and their tools from place to place. On the occasion in question, he and his other co-laborers, seven in all, got on the car with a chest of tools. They acted with some haste, in order to look after two or more bridges that evening. While going at the rate of nine or ten miles an hour, the handle broke and the plaintiff was injured. He sues for damages because of these injuries, and charges negligence on the part of defendant in this (1) that the handle had been made from brittle ash wood, unfit for the use, and (2) that it had been permitted to remain in use without inspection for five years, by reason of which long use and exposure it had become unsafe.

The first question raised is as to whether there was any evidence to warrant the court in submitting the cause to the jury. Plaintiff had used the car for two months before the accident. The handle was about four feet long, passed through an eye of iron by which it was held at the middle. When it broke, plaintiff was at one end

Covey v. The Hannibal & St. Joseph Railway Co.

of the handle, another of the gang was at the other, and a third was at the middle, all at work propelling the car. He says the handle was smooth and one could not tell that it was defective unless examined for defects or taken out; that he did not know that it was defective; that it appeared all right. Four carpenters were called by the plaintiff and were examined, with the broken implement before them, as experts. It appears the handle broke off quite square at the iron band, and at this point was somewhat colored by iron rust, and at the broken part showed evidence of dry rot and was "doty." It had sun-checks in it, or, rather, on the outside. These witnesses generally give it as their opinion that the stick was taken from a large and brittle tree; some say from near the sap, and others say they cannot tell as to that. Some of them say it was taken from a dead tree, one that has no life in it; and others are unable to express an opinion upon that question. They say it was made of light ash. One witness said he did not consider it a strong piece of wood at any time, another that it was light ash and had a little too much age; that it would be lighter if taken from a dead tree than if taken from a green one. The same character of evidence tends to show that if the stick was from a dead or brittle piece of timber, all this could be detected by one when making it into a handle, if the workman paid any attention to that matter. It is said merely looking at the timber would not discover such defects, but a close examination would, and that its weight would be an element; if light, that would indicate that it had been taken from a dead tree. This evidence also tends to show that the handle, when in the car, to all outward appearances was fair. One witness says the decay could have been discovered by an examination at the band.

The defendant proved that the car was built at its shops at Hannibal. Mr. Goff testified that he was a carpenter, and that he worked at the shops; that the handle

Covey v. The Hannibal & St. Joseph Railway Co.

was of his make, and that he built defendant's hand-cars; that the handles came to him sawed out, and that he examined and rejected all unfit pieces; that they are first tested by observation, then in the vise, and again when in the car. He says it is not usual to take them out for inspection after they are once in, and that they usually last as long as the other portions of the car; that no hand-car has been out on the road for more than two years until brought in for repair.

1. It is the duty of the master to use reasonable and ordinary care and foresight in procuring appliances and in keeping the same in repair, to the end that the same shall be safe. He is not required to furnish absolutely safe appliances. What reasonable and ordinary care is, depends upon the nature and character of the implement and the dangers to be encountered in its use. The right to recover damages in this class of cases is made to depend upon proof that the injury was caused by the use of defective machinery, and that the defendant was aware of the defect, or that the use of reasonable care on the part of the defendant would have disclosed the defect. *Elliott v. Ry.*, 67 Mo. 272, and cases cited. Knowledge on the part of the agents of defendant, who are intrusted with the duty of procuring the machinery and of keeping the same in repair, is to be attributed to the defendant. *Porter v. Ry.*, 71 Mo. 66. While the servant is not bound to search for latent defects, he must take notice of those which are open to his observation and of which he has knowledge, and if, with such information, he will use the implement, he does so at his own risk, as to injuries arising from such known defects.

There is no direct evidence in this case that the defendant or its agents at any time knew this handle was defective. There is evidence, however, tending to show that it was made of a bad piece of timber and was de-

Covey v. The Hannibal & St. Joseph Railway Co.

fective, and that this would have been discovered by the use of reasonable care and foresight in the construction of the car and its equipments. It is not our province to determine the weight of that evidence as opposed to that offered by the defendant. It tends, also, to show that this defect in the wood was one which would not be discovered by its ordinary use. Under these circumstances, and this state of the evidence, the demurrer to the evidence and the instructions of a like character were properly refused. *Siela v. Ry.*, 82 Mo. 430.

2. Objection is made to the plaintiff's first instruction, which in substance is, that if, at the time of the injury, defendant operated repair or machine shops at Hannibal, under the supervision of a foreman, at which shops the hand-cars used on the road were furnished and repaired; that the handle in question was unsafe, defective and unfit for use in the car, by reason of being brittle ash, or from brittleness or unsoundness occasioned by long use and exposure to the weather; that said superintendent, or foreman, knew of said defect, or by ordinary care and diligence might have known thereof; that plaintiff was injured by reason of such defects, then the defendant is liable, if plaintiff was at the time exercising ordinary care and was unaware of such defect. We do not see how an instruction could be predicated upon knowledge of the defect by the superintendent of the machine shops, or upon his lack of care. The plaintiff and his co-laborers were under the immediate charge of their foreman, Ryan. Plaintiff says Ryan gave them orders for everything he wanted done; if the cars wanted fixing he told them to go and do it; and that they did not do it unless he ordered them to do so; it was his duty to see that the car was repaired; if anything was wrong with the machinery he ordered new, and his duty was to report to the superintendent of that department, Carter, who lived at Brookfield. The original construction and testing of a handle was delegated to Goff.

Mastin v. Branham.

These facts are not disputed. It is unreasonable to infer from the evidence that a car should be sent to the shops to repair a handle, when in the hands of carpenters. The only inference is, that such repairs were made by them on the order of Ryan. The foreman of the shops does not seem to have had any duty to perform, either as to testing the handles when made, or in looking to the repair. Goff and Ryan stood in the place of defendant in these respects. It was error to single out an agent upon whom none of these duties devolved and predicate a right to recover upon his knowledge of the defect, or want of care. For these reasons the first and sixth instructions given at request of plaintiff should have been refused.

Plaintiff's seventh instruction is probably included in the record by mistake, as there is but one count in the petition.

For the errors before stated the judgment is reversed and the cause remanded for new trial. The other judges concur.

MASTIN *et al.* v. BRANHAM, *Appellant.*

1. **Question of Law: JURY: PRACTICE.** Whether an instrument purporting to be an acknowledgment of a debt is sufficient to take it out of the bar of the statute of limitations is a question for the court, and whether the debt sued for is the one acknowledged is a question for the jury.
2. **Statute of Limitations: ACKNOWLEDGMENT OF DEBT, SUFFICIENCY OF.** The acknowledgment to remove the bar of the statute of limitations (R. S., sec. 3248) must be in writing and signed by the party making it, and must be a direct and an unqualified admission of a subsisting debt which the signer is liable for and is willing to pay.

Mastin v. Branham.

3. ———: ———. An acknowledgment will be sufficient although contained in an application made by a debtor to an insurance company for a policy on his life, when made at the request of the creditor and for his benefit.
4. ———: ———. The acknowledgment may be made before the debt is barred and when so made the statute of limitations will begin to run from the time of the acknowledgment.

Appeal from Jackson Circuit Court.—HON. T. A. GILL,
Judge.

AFFIRMED.

Tomlinson & Ross for appellant.

(1) It is not necessary that the acknowledgement of indebtedness, to be sufficient to take a debt out of the operation of the statute of limitations, should contain a promise to pay the debt. It is only necessary that the indebtedness be acknowledged, and that the acknowledgment be not accompanied by a promise or condition unfulfilled, or anything calculated to rebut a presumption that the party is willing to pay the debt. R. S., sec. 3248; *Bell v. Morrison*, 1 Peters, 362; *Boyd, Adm'r of Carr, v. Hurlbut, Adm'x of Hurlbut*, 41 Mo. 264; *Chambers v. Rubey*, 47 Mo. 99. (2) An acknowledgment made to the creditor, or to his agent, or to a person in interest, or to a third party with the intention or purpose of having said acknowledgment acted upon, is sufficient. *Dinguid v. Schoolfield*, 32 Gratt. (Va.) 803; *Rogers v. Southern*, 4 Baxter (Tenn.) 67; *Palmer v. Butler*, 36 Iowa, 576; *Stuart v. Foster*, 18 Abb. (N. Y.) Pr. 305. (3) An acknowledgment of indebtedness is sufficient, even though it do not refer in express terms to the debt in question, provided reference to such debt were actually intended; and the burden of proving that the acknowledgment did not refer to such debt is on the debtor. *Warlick v. Peterson*, 58 Mo. 408. (4) An acknowledgment made before the bar of the statute has

Mastin v. Branham.

attached, is sufficient to keep the remedy in existence for the statutory period, counted from the date of said acknowledgment. *Scott v. Ware*, 64 Ala. 174; *Patton v. Hassinger*, 69 Pa. St. 305; *Carlton v. Ludlow Woolen Mill*, 27 Vt. 496; *Craig v. Callaway County Court*, 12 Mo. 94; *Inhabitants of Bridgeton v. Jones et al.*, 34 Mo. 471.

Fox & Jones for respondent.

NORTON, J.—The action was begun on September 6, 1882. The cause of action is a promissory note, of which the following is a copy :

“3,000.00.

KANSAS CITY, Mo., Nov. 25, 1868.

“Four months after date I promise to pay to the order of John S. Branham three thousand dollars, without defalcation, value received, payable at the banking house of John J. Mastin & Co., in Kansas City, Missouri, with interest at the rate of ten per cent. per annum from maturity until paid.

“(Signed)

W. I. HAMILTON.”

The note was endorsed by Branham ; a waiver of protest signed by him was written on the back ; also “Int. pd. Time extended to May 28, '69. J. J. M. & Co.” The plaintiffs, respondents here, among other things, allege in their petition that within ten years prior to the date of the bringing of this suit, the defendant, by writing signed by him, acknowledged the indebtedness evidenced by said note. This is denied in defendant's answer and the bar of the statute of limitations pleaded. Trial by court without a jury.

To sustain the allegation that defendant, by a writing signed by him, had acknowledged the debt, plaintiffs offered in evidence a copy of part of an application for life insurance in the Connecticut Mutual Life Insurance Company, in words and figures as follows : “Application for insurance in the Connecticut Mutual Life

Mastin v. Branham.

Insurance Company of Hartford, Connecticut. 1. Name of the person whose life is proposed for insurance. (Write name in full) John S. Branham. 2. How much insurance is desired? Ans. \$4,000.00. 17. For whose benefit is this insurance effected? Ans. John J. Mastin & Co. Relationship to the life insured? Creditor. It is hereby declared and warranted that the above are fair and true answers to the foregoing questions, and that no statements respecting the physical condition, habits, personal or family history of the person whose life is proposed for insurance, other than those above made, have been made to any agent, solicitor, examiner, or other person in behalf of the company, and it is acknowledged and agreed by the undersigned that this application shall form a part of the contract of insurance, and that if there be in any of the answers herein made, any untrue or evasive statements, or any misrepresentations or concealments of facts, then any policy granted upon this application shall be null and void, and all payments made thereon shall be forfeited to the company; and it is further declared by the undersigned that the party making this application has an insurable interest in the life above proposed for insurance, to the full amount above applied for. Dated at Kansas City, Missouri, this eighteenth day of November, 1872. Signature of the person or persons for whose benefit the insurance is to be effected. (Write the name in full) John J. Mastin & Co. Signature of the person whose life is proposed for insurance. (Write the name in full) John S. Branham."

It was admitted by counsel for plaintiffs that the original of the above paper is, and has been ever since made, in the possession and under the control of the Connecticut Mutual Life Insurance Company, and defendant's counsel thereupon objected to the introduction of said copy in evidence, because the paper is not, nor does it contain a statement or acknowledgment made by

Mastin v. Branham.

defendant to plaintiffs, or either of them, nor does it contain any promise or acknowledgment of indebtedness sufficient to take the case out of the operation of the statute of limitations. The court admitted the paper in evidence and defendant duly excepted to the ruling of the court.

Counsel then agreed upon the following matters of fact: A policy of insurance was issued on said application, insuring the life of said Branham for the benefit of John J. Mastin & Company, creditors, as their interest may appear. Said policy was surrendered by Branham and John J. Mastin & Company to the insurance company, January 30, 1882, and a full paid up policy for \$733 in lieu thereof, written by the company on the life of said Branham, and payable to John J. Mastin & Company, as their interest may appear. Said last mentioned policy was dated February 3, 1882, and was delivered by said company to John J. Mastin & Company.

John J. Mastin then testified as follows: "When the note sued on was executed, the firm of John J. Mastin & Company was composed of John J. Mastin and Thomas H. Mastin. We were unable to make anything out of Hamilton, the maker of the note, and supposed him to be insolvent. The indebtedness referred to in the application for insurance was their note, upon which Branham was endorser, for Branham did not owe us then any other debt. I do not recollect the circumstances of making out the original application, except in a general way. I presume I suggested the matter to Branham, and that he and I made out the application in my office, in the presence of some agent of the insurance company, and handed it to the agent there. That would be the usual way. John J. Mastin & Company always paid the premiums when they became due, on the policy issued upon that application. When the old policy was given up, the new paid up policy for \$733 was given us in lieu of the old one, and is in my possession."

Mastin v. Branham.

Defendant offered no evidence, and the court entered up judgment for plaintiffs, after refusing the following instructions asked by the defendant:

"1. The application for insurance in evidence is not an acknowledgment of indebtedness sufficient to remove the bar of the statute of limitations, or to take this case out of the operation of the statute, because there cannot be found in it (said application) an unqualified and direct admission of a debt subsisting when said application was made, on which defendant in said application states that he is liable and willing to pay to plaintiffs."

"2. The application for insurance in evidence is not an acknowledgment of indebtedness sufficient to take the note sued on out of the operation of the statute of limitations, for the reason that there is no evidence tending to show that the application and the statements in it were made to plaintiffs, or to either of them, or to any agent of plaintiffs, for the collection of the debt, or to any person who had a legal or equitable interest in the debt."

"3. An acknowledgment of indebtedness can only be relied on to remove the bar of the statute *after* it has attached. The application for insurance is of no avail to plaintiffs, because when it was made the debt sued on was not barred."

Whether the acknowledgment in the application for insurance was sufficient to prevent the statute of limitations from operating as a bar to plaintiff's right of action, was a question of law, to be decided by the court, and whether the debt acknowledged related to the one sued for, was a question of fact, to be decided by the triers of the fact. *Warlick v. Peterson*, 58 Mo. 408. The only question which the record in this case presents for determination is, whether the acknowledgment is sufficient in law to prevent the bar of the statute. Under section 3248, Revised Statutes, an acknowledgment

Mastin v. Branham.

of a debt, to prevent the bar of the statute, must be in writing and signed by the party making it; and under the rulings of this court in the cases of *Boyd, Adm'r of Carr, v. Hurlbut*, 41 Mo. 264, and *Chambers v. Rubey*, 47 Mo. 99, the acknowledgment must be of a present subsisting debt on which the law would imply a promise to pay, it being said in the case last above cited: "In the case of *Carr's Adm'r v. Hurlbut, Adm'r*, 41 Mo. 264, it was said that to take a case out of the statute of limitations, there should be either an express promise to pay, or an acknowledgment of an actual subsisting debt, on which the law would imply a promise. But if the acknowledgment was accompanied with conditions or circumstances which repelled or rebutted the presumption of a promise or intention to pay, or if the expressions used were vague, equivocal or ambiguous, leading to no or determinate conclusion, they would not satisfy the requirements of the statute. It is not necessary, however, that the promise should be express; it may be raised by implication of law, from the acknowledgment of the party. But such acknowledgment should contain an unqualified and direct admission of a present subsisting debt on which the party is liable and willing to pay."

Testing the acknowledgment in this case by section 3248, *supra*, and by the rulings made in the above cases, we must hold it to be sufficient. It is in writing, and signed by the party making it, and, in this respect, it is in strict compliance with the requirements of the statute; and it fully answered the requirement of the rulings made in the above cited cases in this, that it not only contains a direct, unqualified admission that plaintiffs were the creditors of defendant (which can mean nothing else than that at the time it was made, defendant was indebted to plaintiffs, but it goes further and shows that the acknowledgment was made for the purpose of furnishing plaintiff a security

Mastin v. Branham.

for the debt acknowledged, thus showing a willingness to pay it. But it is contended that the acknowledgment was made to the insurance company, a stranger, and not to plaintiffs, and that for that reason it was improperly admitted in evidence. Conceding, for the purpose of this case, that an acknowledgment of an existing debt to a mere stranger, in no way connected with the debt, in interest, or otherwise, would be insufficient to remove the bar of the statute, the principle invoked can have no application to the case before us, under the facts in evidence, which show that the application containing the acknowledgment was made at the request of one of the plaintiffs, that it was made out by one of the plaintiffs, and defendant, in plaintiff's office, in the presence of an agent of the insurance company, and after its completion was handed to the agent for the express purpose of having the company to act upon it for the benefit of plaintiffs. The application was but the initial step to the further step taken of having the policy, as a security for the debt, acknowledged. Mastin & Company were parties to this arrangement, paid all the premiums on the policy, which was finally surrendered to the company by plaintiffs and defendant, and a full paid up policy for seven hundred and thirty-three dollars in lieu thereof issued, payable to plaintiffs, creditors of said insured, as their interest might appear, and which policy was delivered to plaintiffs by said company. There were three parties to the transaction which culminated in the issuance of the policy, plaintiffs being one of them, and the only one who could derive a beneficial interest from the acknowledgment made in the application, and it was to secure this interest to plaintiffs that the acknowledgment was made at plaintiff's request to be acted on for their benefit. Hence we say that the rule invoked, even if it

Mastin v. Branham.

be as contended for by defendant's counsel, does not apply to this case.

It is also insisted that because the acknowledgment of the debt was made before the bar of the statute attached, it cannot have the effect of stopping the operation of the statute, and the case of *Elliott v. Leake*, 5 Mo. 208, is referred to as sustaining the proposition. It is true it is said in that case, that to take a case out of the statute "there must be an original debt *barred by the statute*." This expression was a mere *dictum*, as the question before the court was whether or not the acknowledgment in that case, made long after the bar of the statute had attached, was sufficient; and there was nothing in the case calling for an expression of opinion as to what would be the effect of an acknowledgment of a debt made before the bar attached. Besides this, it has been held in the cases of *Craig v. Callaway County Court*, 12 Mo. 94, and *Inhabitants, etc., v. Jones*, 34 Mo. 471, that where a payment is made on a debt before the bar of the statute has attached, that the statute only begins to run from the time of such payment. We can perceive no reason why the same rule should not apply to an acknowledgment of a debt made before the bar has attached; indeed, that result would logically follow from the ruling made in the cases last cited. See, also, *Carlton v. Ludlow Woolen Mill*, 27 Vt. 496; *Scott v. Ware*, 64 Ala. 174; *Patton v. Hassinger*, 69 Pa. St. 311. Judgment affirmed, in which all concur.

Peery v. Carnes.

PEERY, *Plaintiff in Error*, v. CARNES.

1. **Bankruptcy: ASSIGNEE, POWERS OF: PRACTICE.** An assignee in bankruptcy becomes entitled to the property of the bankrupt fraudulently conveyed, concealed or inadvertently omitted, as well as that scheduled and surrendered; he acquires the title thereto by virtue of the proceedings in bankruptcy and the deed of assignment, and is the proper party to sue for and recover the same.
2. ———: ———: **PRACTICE: TRUSTEE.** So long as the proceedings in bankruptcy are pending, the assignee is the only proper person to sue, and the creditors are bound to assert their rights as such by and through the assignee, who is a trustee for the creditors and the bankrupt, with power to collect the assets and convert the assigned property into money and distribute it among the creditors. When this is done and the proceedings are brought to an end his trust ceases, and whatever is left in his hands becomes the property of the bankrupt by operation of law, without any formal discharge of the assignee or re-transfer.
———: **PRACTICE: BANKRUPT.** After the assignee's trust has ceased and the bankrupt has been discharged, the latter is the proper party to sue for demands due himself, at the time he was adjudged a bankrupt.

Error to Grundy Circuit Court.—HON. G. D. BURGESS, Judge.

REVERSED.

A. W. Mullins for plaintiff in error.

(1) The circuit court erred in sustaining defendant's motion to strike out portions of plaintiff's replication. If none of plaintiff's indebtedness was proven up or allowed in the bankruptcy court, and if his indebtedness, on account of which he was adjudged a bankrupt, had been paid, it follows that there were no creditors to

Peery v. Carnes.

be paid by or through the assignee in bankruptcy, and, therefore, his trust relation with respect to said estate ceased and terminated, and the property, rights, claims and demands which had passed to the assignee, reverted and vested again, by operation of law, in the plaintiff. *Page v. Waring*, 76 N. Y. 463, 473; *Perry on Trusts*, (3 Ed.) secs. 351-2-3, 920; *Charman v. Charman*, 14 Vesey, 580, 584. (2) The court erred in giving the declaration of law asked by defendant and in refusing to declare the law as asked by the plaintiff. The pleadings on both sides allege and the evidence conclusively shows that no debts or claims were presented, proved up or allowed against plaintiff's estate whilst in bankruptcy. And the fact that the bankruptcy court ordered that the sum of \$1.28 be paid back to the plaintiff, shows that the court found there were no debts to be paid and the functions of the assignee were at an end. No more formal order for the discharge of the assignee was required by the bankruptcy law than was made by the court in that case. R. S., U. S., sec. 5096, p. 988. By the discharge the bankrupt became, by operation of law, fully invested with the same rights and entitled to the same remedies as before his bankruptcy. *Page v. Waring*, 76 N. Y. 463; *Perry on Trusts* (3 Ed.) secs. 351, 352, 353, 920; *Charman v. Charman*, 14 Vesey, 580, 586; *Connors v. Express Co.*, 52 Ga. 37; s. c., 5 Am. R. 543.

Shanklin, Low & McDougal, Stephen Peery and E. M. Harber for defendant in error.

(1) The court committed no error in declaring the law or in refusing to declare it as prayed by plaintiff. If the claims here sued for, alleged to have been created on the fourth day of June, 1878, were in existence on the third day of August, 1878, the time of the adjudication in bankruptcy, then they not only vested in the

Peery v. Carnes.

assignee, but the fact that they were withheld from the assignee, was and is a fraud upon the creditors of the bankrupt and they can only be recovered by the assignee or his successor, in case of his death, for the benefit of the creditors. *Clark v. Clark*, 17 How. (U. S.) 315. Although the bankrupt had been formally discharged from his debts, yet the property and rights of property vested in the assignee and were subject to the creditors of the bankrupt, and the fact that none of the creditors proved up their claims makes no difference. *Clark v. Clark*, *supra*; *Glenny v. Langdon*, 8 Otto (U. S.) 20; *Trimble v. Woodhead*, 12 Otto (U. S.) 647; *Moyer v. Dewey*, 13 Otto (U. S.) 301. Even though it should be admitted that after the formal discharge of the assignee, property of the bankrupt in his hands not required for the payment of the proven debts of the bankrupt, would revert, by operation of law, in the bankrupt, yet it is insisted: (a) That there can be no such result until the assignee is discharged, and (b) that property fraudulently conveyed by the bankrupt prior to the adjudication, or property or means, including rights in action, fraudulently concealed or withheld from the assignee at the time of the adjudication, would never, under any circumstances, revert in the bankrupt. *Clark v. Clark*, 17 How. (U. S.) 315; *Glenning v. Langdon*, 8 Otto (98 U. S.) 20; *Trimble v. Woodhead*, 12 Otto (102 U. S.) 647; *Moyer v. Dewey*, 13 Otto (103 U. S.) 201.

(2) The subject matter of this suit, if it had any existence, unquestionably passed to the assignee by virtue of the assignment (R. S., U. S., section 5044), or by the adjudication and the appointment of the assignee. R. S., U. S. sec., 5046; U. S., R. S., sec. 5057. In this case, the subject matter of this suit, if it had any existence in fact, could be sued for and recovered only by the assignee, and even had the assignee been discharged, he would have held the assets as trustee for the bankrupt until actually surrendered. We submit,

Peery v. Carnes.

that while waiting for the time to elapse within which proceedings to set aside the discharge might be commenced, the two years within which the assignee might bring his action also elapsed, and that after two years no action can be maintained either by the trustee or *cestui que trust*. *Meeks v. Olpherts*, 10 Otto (110 U. S.) 564; *Moyer v. Dewey*, 13 Otto (103 U. S.) 301.

BLACK, J.—The demands sued for, amounting to some \$18,000, if they ever had any existence in point of fact, accrued on the fourth of June, 1878, and were subsisting claims at a subsequent date when plaintiff was adjudged a bankrupt. The pleadings present a vast number of issues of fact as to which no questions of law are preserved by the record and they need not be stated.

The record recites that plaintiff offered evidence tending to prove the issues on his part and defendant did the like. Defendant read in evidence a transcript of the record in the matter of bankruptcy of plaintiff. This is the only evidence preserved. The court, at the request of the defendant, gave an instruction to the effect that if plaintiff was adjudged a bankrupt, that an assignee was appointed, qualified and received a deed of assignment, and that the assignee has not been discharged, then the finding should be for the defendant; and refused an instruction of the opposite effect. These were all the instructions asked or given and thereupon plaintiff took a non-suit with leave, etc.

From this transcript it appears plaintiff was declared a bankrupt on his own petition on the third of August, 1878. An assignee was appointed, who qualified and received a deed of assignment in September following. Although the schedules disclose a number of creditors including debts to the amount of \$17,000, upon which defendant was bound as surety, yet none of the credi-

Peery v. Carnes.

tors proved up their demands. On the fifteenth of March, 1879, an order was made allowing the accounts of the register, clerk and assignee and a balance of \$1.28 was ordered to be paid the bankrupt and on the same day the bankrupt received his discharge. Admissions contained in the pleadings, taken in connection with the transcript, further show that in 1880 certain creditors, at the instance of defendant, filed their petition to set aside the discharge on the ground that plaintiff had fraudulently withheld some \$14,000 in money. This petition was dismissed in the same year with the consent of defendant. The demands here sued for were not scheduled or mentioned in any of the proceedings in bankruptcy. This suit was commenced in November, 1881.

✓ The assignee became entitled to the property of the bankrupt fraudulently conveyed, concealed or inadvertently omitted, as well as that scheduled and surrendered, and was the proper party to sue for and recover the same. He acquired the right and title thereto by virtue of the proceedings in bankruptcy and the deed of assignment. So long as the proceedings were pending he was the only proper party to sue; and the creditors were bound to assert their rights as creditors by and through the assignee. *Glenny v. Langdon*, 93 U. S. 20; *Trimble v. Woodhead*, 102 U. S. 647; *Moyer v. Dewey*, 103 U. S. 301. But the assignee is but a trustee for the creditors and bankrupt. The machinery of the law is designed to enable him to collect the assets, convert the assigned property into money and distribute the same among the creditors. His trust ceases when all this is done and the proceedings are brought to an end. Whatever there is in his hands after the debts are paid and his active duties are performed becomes the property of the bankrupt by operation of law, without any formal discharge of the assignee or re-transfer. Perry on Trusts (3 Ed.) secs. 351-2-3, 920;

Peery v. Carnes.

Conner v The Southern Express Co., 42 Ga. 37; *Page v. Waring*, 76 N. Y. 463.

Here no debts were ever proved up; the balance of fees was ordered paid to the bankrupt; the petition to vacate the bankrupt's discharge was dismissed, and no proceedings have been taken by the assignee or the creditors to assert any claim to the alleged demands sued for. As the record stands there is but one conclusion and that is that the assignee's trust had ceased. The plaintiff may maintain this suit, and if defeated it must be upon facts other or additional to those hypothesized in the instructions. It also follows that the motion to strike out that part of the reply which sets up in substance that the assignee had no further duties to perform, and that the debts were paid, should have been overruled. For these errors the judgment must be reversed and the cause remanded for new trial.

While the record does furnish evidence that the demands now sued for, if such there are in fact, were fraudulently concealed by the bankrupt, and on the other hand that the alleged settlement of the parties about the petition to set aside the discharge was withdrawn, was really a scheme to defeat the ends of the bankrupt law, still the record does not furnish all the evidence, at least no questions of law are preserved in this respect, and we dismiss the consideration of the questions arising upon such evidence until they are presented in a tangible shape.

Judgment on non-suit is reversed and cause remanded. The other judges concur.

VOL. 86—42

Harding v. Nettleton.

HARDING V. NETTLETON, Receiver, Plaintiff in Error.

1. **Railroad : RECEIVER, ACTION AGAINST : CONTRACT.** An action can be brought in a state court against a receiver of a railroad by permission of the United States court which appointed him, for the breach of a contract for the purchase of ties, made by the railroad before the appointment of the receiver.
2. **Receiver : JUDGMENT.** The judgment of the state court cannot be enforced against the property of the corporation in the hands of the receiver, but must be presented to the United States court for allowance, and the latter court will determine the manner and time of paying it out of the assets of the road.

Appeal from Jackson Circuit Court.—HON. S. H. WOODSON, Judge.

AFFIRMED.

Pratt, Brumback & Ferry for plaintiff in error.

A receiver of a railroad, appointed *pendente lite* by a court of chancery, upon a bill by or on behalf of bondholders for the foreclosure of a railway mortgage, is not authorized to appropriate the property and assets of the corporation and its earnings to payment of contract debts of the company, incurred previous to his appointment; nor are such debts binding upon the receiver or a charge upon the assets in his hands. High on Receivers, secs. 273, 391; Jones on Railroad Securities, sec. 569. The alleged contract was an oral one and void under the statutes of fraud.

HENRY, C. J.—Harding sued to recover twenty-five hundred dollars damages for an alleged breach of contract for the sale of railroad ties, charging in his petition that on or about January 10, 1878, prior to the appointment of Nettleton, as receiver, plaintiff made a contract with

Harding v. Nettleton.

said railroad company to sell and deliver to it at times specified, twenty-seven thousand railroad cross-ties at sixty-five cents per tie. That under said contract, on January 24, 1878, he delivered to said company, which accepted two hundred and eighty-two ties, for which the said company paid him the said contract price. That he was willing and ready to comply with his contract, but the said company, about the time of the delivery of the two hundred and eighty ties, refused to take any more ties. That in March, 1878, Nettleton was appointed by the circuit court of the United States for the district of Kansas, receiver of said railroad corporation. That he accepted the appointment and qualified as such and thereby became entitled to, and took, held, and received all the property, etc., of said company and was managing the same, subject only to the orders of said court, and that on the second of August, 1878, said court, by its order, gave plaintiff leave to prosecute this action against Nettleton in the state court.

The action was tried at the April term of the Jackson circuit court, and the trial resulted in a judgment for plaintiff, from which defendant has prosecuted an appeal to this court. The testimony for plaintiff was a copy of the order of the said United States court, appointing Nettleton receiver as alleged, and a copy of the order granting plaintiff leave to sue in the state court as alleged.

Harding testified to the contract as stated in the petition, the delivery of two hundred and eighty ties under the contract to the said company, and the payment for the same by the company at the contract price, and its refusal to receive any more. At the conclusion of plaintiff's evidence, a demurrer to the evidence submitted by defendant's counsel was overruled. Defendant then offered, as evidence, a report of the roadmaster of the Leavenworth, Lawrence & Galveston Railroad Company of two hundred and eighty ties purchased of Harding

Harding v. Nettleton.

and received February 2, 1878. A receipt for the ties from B. S. Henning, receiver of the Leavenworth, Lawrence & Galveston Railroad Company, signed by Harding, dated March 4, 1878, and, also, a check dated March 14, 1878, as follows:

"No. 795. ROSEDALE. KAS., March 14, 1878.

"LEAVENWORTH, LAWRENCE & GALVESTON, RY. CO.

"*B. S. Henning, Receiver.*

"Pay to the order of Wm. Harding.....

"One Hundred and Forty-nine..... Dollars.

"C. H. PRESCOTT, Accountant.

"ALDRICH.

"\$149.00. To the Mastin Bank, Kansas City, Mo."

(Stamped across the face: "The Mastin Bank, Kansas City. Paid May 16, 1878. Endorsed: Wm. Harding.")

In rebuttal, Harding testified, that when he received the money he did not notice the heading of the check. That Campbell, with whom he made the tie contract, was purchasing agent for both of the said railroad companies. That plaintiff had no control over the ties after they were shipped. Did not know which road used the two hundred and eighty ties. They were shipped to the Missouri River, Fort Scott & Gulf Railroad Company. That he did not notice the heading of the receipt he gave.

The court, at the instance of plaintiff, gave the following instruction:

"If the jury believe from the evidence that plaintiff made with the Missouri River, Fort Scott and Gulf Railroad Company a contract to sell it the cross-ties, as alleged in the petition, and that said company received and paid for a part thereof, and refused to receive the remainder or inspect the same, and that

Harding v. Nettleton.

plaintiff had and offered to deliver and submit to its inspection such ties, then the jury will find for plaintiff."

The court also gave an instruction in relation to the measure of damages, which is unexceptionable. Defendant asked the court to declare, that if no contract was made by Nettleton, as receiver of the railroad company, the jury should find for defendant. This was refused, also, one declaring that on the pleadings and proofs, the jury should find for defendant.

At the request of the defendant, the court gave the following instruction :

"4. The court instructs the jury, that unless they find from the evidence that the ties mentioned and described in the petition, or some part thereof, were delivered to and actually received by the Missouri River, Fort Scott & Gulf Railroad Company, under the contract set forth in the petition herein, or that the purchase price, or some part thereof, was paid by said railroad company to plaintiff, said contract is void under the statute of frauds, and your verdict must be for the defendant."

The jury found a verdict for plaintiff for twenty-five hundred dollars. There was evidence sufficient to warrant the verdict, and the instructions given, correctly declared the law, provided the court properly refused the defendant's first instruction, to the effect, that if Nettleton, the receiver, made no contract for the ties, the jury should find for him.

The contention of appellant's counsel is, that no action is maintainable against the receiver, except for labor, materials and supplies necessary for the operation of the road and furnished to him. Plaintiff certainly could have proceeded in the court which appointed the receiver, to have his claim allowed against the corporation, and that court has, by order, permitted him to sue in the state court. The judgment of the state court cannot be enforced against the property of the corporation in the hands of the receiver, but must be presented to the United

The Hannibal & St. Joseph Railway Co. v. Shortridge.

States court for allowance, and that court will determine how and when it may be paid out of the assets of the corporation. The judgment simply ascertains the amount which plaintiff is entitled to. The order in which it shall be paid is a matter which will be determined by the circuit court of the United States for the district of Kansas. The property of the corporation "entrusted to the care of the receiver is regarded as being in *custodia legis* for the benefit of whoever may eventually establish title thereto, the court, itself, having the care of the property by its receiver." High on Receivers, sec. 1, ch. 1. See, also, secs. 176, 177, 178, ch. 7. That court is competent to protect other creditors of the corporation who have a right to be paid out of the assets before the plaintiff receives the amount of his judgment. The judgment is affirmed.

THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Appellant*, v. SHORTRIDGE *et al.*

Ejectment: RECOVERY FOR IMPROVEMENTS. Defendant made application to plaintiff to purchase land of the latter, paid the cash installment, and was put into possession by plaintiff and made improvements by its authority, pending the consideration of the application. The application was finally rejected, and upon the bringing of ejectment for recovery of possession by plaintiff, defendant pleaded the facts and asked that he be allowed the value of his improvements. *Held*, that defendant was entitled to plead any equitable lien growing out of the application, and the assurances given in connection with it, and to recover the value of his improvements and have the amount adjudged a lien, and was entitled to an order restraining plaintiff from issuing execution for possession till the amount was paid.

Appeal from Macon Circuit Court.—HON. ANDREW ELLISON, Judge.

The Hannibal & St. Joseph Railway Co. v. Shortridge.

AFFIRMED.

Strong & Mosman and *Geo. W. Easley* for appellant.

(1) No judgment or decree of dispossession having been given at the time of filing of the answer, no right of action for the recovery of the value of the improvements had accrued to Shortridge. R. S., sec. 2259. (2) This proceeding, if maintainable, entirely abrogates all the provisions of the occupying claimants' law. R. S., secs. 2259, 2266. (3) In no event could the court below render an absolute and unconditional judgment for the value of the improvements and enforce such judgment by execution. *Russell v. De France*, 39 Mo. 506. In no case has a direct money judgment ever been given in such a case in this court. *Shroyer v. Nickell*, 55 Mo. 264; *Henderson v. Langley*, 76 Mo. 226. The statute giving the right to recover the value of the improvements is a repeal of the equitable mode of recovery in force prior to the adoption of the statute.

James Carr for respondents.

(1) Independent of any statute on the subject, respondent had the right to set up his claim for the value of the improvements which he had put upon the premises in good faith, and before notice of the rescission of the contract under which he had entered. Story's Eq., sec. 64 k; *Paris v. Haley*, 61 Mo. 454. (2) The practice act expressly provides for setting up a counter-claim in the following language: "The answer of the defendant shall contain * * * ; second, a statement of any new matter constituting a * * * counter-claim, in ordinary and concise language, without repetition." R. S., sec. 3521. It is sufficient if the defendant's right to the damages relied on as a counter-claim grows out of

The Hannibal & St. Joseph Railway Co. v. Shortridge.

a contract between him and the plaintiff. *Empire Transp. Co. v. Boggiano*, 52 Mo. 296; *McAdow v. Ross*, 53 Mo. 199. If the appellant was not satisfied to have all the equities between it and the respondent, Shortridge, settled in this suit upon the issues made on the counter-claim, it should have either demurred or moved to have the counter-claim stricken out, instead of filing a reply to said counter-claim, and thereby joining issue and going to trial upon that issue. *Mason & Craig v. Heyward*, 3 Minn. 182; *Whalon v. Aldrich*, 8 Minn. 346. It has always been held that the defendant, when he has entered into possession under a contract with the plaintiff, can maintain a counter-claim for the value of the improvements put upon the land, in good faith. *Henderson v. Langley*, 76 Mo. 226; *Mobley v. Nave*, 67 Mo. 546; *Shroyer v. Nickell*, 55 Mo. 264.

BLACK, J.—This was ejectment for eighty acres of land. On February 18, 1880, the defendant Shortridge made application to Walker, defendant's local agent at Macon, for the purchase of the land. The application was in writing and stated the terms of the sale to be on six years' credit, one-fifth down. The application was forwarded to Mr. Price, land commissioner at Hannibal, who withheld his approval for a time, only to investigate the claims of Otis to the land, and so wrote to Walker, who informed defendant and assured him that Otis had no valid claim.

Defendant purchased the land, or made the application for the purchase, for the purpose of building upon it at once. He paid to Walker the cash installment, and was by Walker put into possession, and at once made improvements on the land, including the erection of a house. Defendant saw Mr. Price at Hannibal, from the twentieth to the twenty-fifth of February, 1880. Mr. Price informed him of the cause of the delay, but told the defendant to go on and improve the land. Afterwards, Mr. Price discovered that this land was of a class

The Hannibal & St. Joseph Railway Co. v. Shortridge.

which he had been directed not to sell, and for this reason he disapproved the application, of which defendant was notified, but in the meantime he had completed the house. Defendant, in substance, pleaded these facts and asked to be allowed the value of the improvements. Plaintiff had judgment for possession. Defendant was awarded the value of his improvements, from which the plaintiff appealed.

Under these circumstances, the defendant was entitled to recover the value of his improvements in some form of action, and this does not appear to be seriously denied; but it is contended that he could only do this under the occupying claimant's statute. Sec. 2259, etc., R. S. If this be correct, then the judgment or decree in the defendant's favor cannot be sustained, for the proceeding indicated by those sections can only be resorted to after there is a final judgment of dispossession. *Malone v. Stretcher*, 69 Mo. 25; *Henderson v. Langley*, 76 Mo. 226. But here, the defendant went into possession and made the improvements by authority of plaintiff, and does not hold adversely to it, but under and by authority from it. Had the application for the purchase of the land been approved, so as to be a binding contract, he could have pleaded that as an equitable defence to the ejectment suit. In like manner he may plead any equitable lien growing out of the application, and the assurances given him in connection therewith. His equities may be adjusted on his answer in this case. *Valle's Heirs v. Fleming's Heirs*, 29 Mo. 152; *Shroyer v. Nickell*, 55 Mo. 264; *Mobley v. Nave*, 67 Mo. 546; *Sims v. Gray*, 66 Mo. 613.

It is true, the decree in defendant's favor was for money only, when he might well have had the amount adjudged a lien and an order restraining defendant from issuing execution for possession until that amount was paid, but he does not complain, and we think the judgment should not be reversed. Affirmed. All the judges concur.

Bean v. Kenmuir.

BEAN V. KENMUIR, *Appellant.*

Deed, Construction of: HABENDUM: LIFE ESTATE: REMAINDER. A deed, after reciting that the party of the first part, in consideration of one dollar, to her in hand paid, and in further consideration of natural affection for the party of the second part, does grant, bargain and sell, unto Neamie J. Talley, the party of the second part for her sole use and benefit, certain real estate described in the conveyance, contained the following *habendum*: "To have and to hold the said tract, pieces, or parcels of land, together with all the rights, privileges and appurtenances thereto belonging, or in any wise appertaining to the said party of the second part, her heirs and assigns forever; and in case of the death of said party of the second part, then said property, with all the rights and privileges therein, shall pass to the husband of said Neamie, William W. Talley; said property in the meantime not to be subject to the debts of said W. W. Talley." *Held*, that under the deed a life estate vested in Neamie J. Talley, with the remainder over in fee in her husband.

Appeal from Jackson Circuit Court.—HON. F. M. BLACK, Judge.

AFFIRMED.

Lathrop & Smith and L. C. Slavens for appellant.

(1) The deed from Elizabeth S. Mettie to Neamie J. Talley conveyed a separate estate in fee to her, and that part of the *habendum* which attempted to limit a remainder to her husband, William W. Talley, on her death is void. 2 Greenleaf's Cruise, p. 651, secs. 75, 76; 2 Blackstone's Com. 298; *Goodlittle v. Gibbs*, 2 B. & C. 707; *German v. Orchard*, 1 Salk. 346; *Boddington v. Robinson*, L. R. 10 Excheq. 270; 4 Kent's Com. (7 Ed.) 519; 2 Hilliard on Real Prop. (2 Ed.) p. 355, sec. 155; Coke on Littleton, 299 a; Shepherd's Touchstone, chap. 5, p. 102; 4 Comyn's Digest (4 Ed.) 168; 1 Stephen's Com. 450; *Baldwin's case*, 2 Rep. 23; *Earl of Rut-*

Dean v. Kenmuir.

land's case, 8 Rep. 56; 3 Washburn on Real Prop. (4 Ed.) p. 436, sec. 60, *642. Where the words of an *habendum* in a deed are manifestly contradictory and repugnant to the words in the premises, the former are to be disregarded; but where part of the words in the *habendum* is contradictory to those in the premises, and part explanatory, the contradictory part only need be rejected. *Doe d. Timmis v. Steele*, 4 Ad. & Ell. 663; *Deaver v. Rice*, 3 Battle's Rep. (N. C.) 433; *Hafner v. Irwin*, 4 Dev. & B. 433; *Porter v. Ingram*, Harper (S. C.) 492; *Bend v. Susquehanna, etc., Co.*, 6 Har. & J. 132; *Ide v. Ide*, 5 Mass. 500; *Pyncheon v. Stearns*, 11 Met. 312, 316; *Cong. Soc. of Halifax v. Stark*, 34 Vt. 243; *Ramsdell v. Ramsdell*, 21 Me. 288; *McLean v. Macdonald*, 2 Barb. 534; *Jackson v. Bull*, 10 John. 19.

Scarritt & Scarritt for respondent.

RAY, J.—This is an action of ejectment for a lot in Ranson and Salley's addition to the City of Kansas. Emily J. Talley, W. W. Talley, and George W. Talley, were the owners of the west one-half of the northwest quarter of section four, township forty-nine, range thirty-three, of which the lot in question is part, on and prior to April 5, 1862. On this last mentioned date, W. W. Talley and wife, and George W. Talley, made a deed of quit-claim of all their interest in this property to Elizabeth S. Mettie, who was the mother of the wife of W. W. Talley. On July 20, of the same year, Elizabeth S. Mettie made a deed of her interest in the property to Neamie J. Talley, the wife of W. W. Talley, Neamie J. Talley, died—the exact date is not given. Her husband died some time after she died.

Plaintiff and defendant both claim title to two-thirds of the lot under the deed from Elizabeth S. Mettie to Neamie J. Talley, the plaintiff, by sundry mesne conveyances from the administrator and heir of William

Dean v. Kenmuir.

Wallace Talley. Neamie had no children, and the defendant claims title through her brothers and sisters. It is conceded, here, that plaintiff is entitled to recover as to one-third of the lot. The controversy, therefore, is as to the title to the remaining two-thirds of the lot, and depends wholly upon the proper construction of said deed from Elizabeth S. Mettie to Neamie J. Talley, which is as follows:

“This deed, made and entered into, this twentieth day of July, 1862, by and between Elizabeth S. Mettie, of the first part, and Neamie J. Talley, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar, to her in hand paid by said party of the second part, receipt of which is hereby acknowledged, and in further consideration of natural affection for said party of the second part, has granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said party of the second part, for her sole use and benefit, the following described real estate, situated in the county of Jackson, in the state of Missouri, to-wit: ‘All my interest in the west half of the northwest quarter of section number four, of township number forty-nine, in range number thirty-three, and all the town lots there as laid out as an addition to the City of Kansas, and described in the recorded plat, said interest being an undivided two-thirds of the same, to have and to hold the said tract, pieces, or parcels of land, together with all the rights, privileges and appurtenances thereto belonging, or in anywise appertaining to the said party of the second part, her heirs and assigns forever; and in case of the death of the said party of the second part, then said property, with all the rights and privileges therein, shall pass to the husband of Neamie, William W. Talley, said property in the meantime not to be subject to the debts of said W. W. Talley.

“In witness whereof, the said party of the first part

Bean v. Kenmuir.

has hereunto set her hand and seal, the day and year above written.

"ELIZABETH S. METTIE. (SEAL)."

On the part of the plaintiff it is contended that Neamie J. Talley, by the deed, took a life estate only, with the remainder to W. W. Talley, her husband, and hence at her death the property went to him. On the other hand, the defendant insists that Neamie J. Talley took the fee-simple, by the deed in question, and at her death the title thereto descended to her brothers and sisters. The deed in question contains apt and sufficient words to convey a fee to the daughter, Neamie, and contains, also, words plainly expressing a limitation over to the husband, W. W. Talley, and the question is, how shall the instrument be construed so as to arrive at and render effective the intention of the party making the same. It is apparent that the actual consideration of the deed is one of love and affection, and we must find, if we can, the course the grantor designed and intended the title to take. It is familiar doctrine that the construction of deeds must be upon the entire instrument, with the view to give, if possible, meaning and effect to each and every part of it. The clause in the deed in question, in which, upon the death of the daughter, Neamie, the property is to pass to her husband, and declaring that, in the meantime, it shall not be subject to the husband's debts, is manifestly a prominent feature in the instrument. So far as it alone is expressive of the grantor's intention, its fair and unstrained import is to convey the property to Neamie J. Talley, for her sole use and benefit during her life, with remainder to her said husband, W. W. Talley. It indicates clearly that, during her life, the daughter is to have the control and use of the property, without interference by the husband, or husband's creditors, and it further indicates with equal clearness, the grant of a remainder to the husband.

Bean v. Kenmuir.

Now, if the intention of the grantor was to convey an estate in fee to the daughter, why was such a clause, with such a provision, inserted in the instrument? It was unnecessary, and worse than idle, for any such purpose. The significance and import of these words in the grant cannot, we think, be overlooked. Nor can they be disregarded unless they plainly contravene some settled rule of law, which requires us to reject them. But it is claimed that there is such a rule of law and it is invoked to defeat the intention of the grantor in the deed, and this rule is said to be, that where a deed contains apt and sufficient words for a conveyance of the fee, and fails to *expressly* convey an estate for life to the first taker, then the remainder over is void. As applied to this case, the proposition is that the deed from Elizabeth Mettie to Neamie J. Talley conveyed a a separate estate in fee to her, and that, as it fails to expressly convey a life estate to her, that part of the *habendum* which attempted to limit a remainder to her husband, W. W. Talley, upon her death, is void. It is said that a life estate is usually created by words of express limitation, and in the absence of such words, will not be assumed. And there are cases in which the limitation over has been defeated for want of such express life estate. 50 Mo. 192. And there are, also, numerous adjudications in which the limitation over has been held imperative, upon the ground that the conveyance or devise was coupled with a distinct power of disposition. 50 Mo. 186; 47 Mo. 277. There is, also, a line of decisions where the deeds or wills under consideration, in one or more clauses, have imported to convey or devise an absolute estate and remainder given to another, by subsequent clauses in the instrument, and in which it has been held that the first grant or devise took a life estate, and the remainder over upheld.

The deed, in question does not, by express words,

Bean v. Kenmuir.

vest a life estate only in Neamie J. Talley, nor does it give a distinct or express power of disposition. The words, heirs or assigns are not entitled to the weight counsel give them. They were not then, and are not now, necessary to create a fee, and their presence in the deed is without legal meaning or significance. They could detract nothing from being absent, and they could add nothing by being present. They mean, when thus superfluously used, what the law would imply without them, and nothing more. The word assigns, as here used, would be given a strained meaning, if it was allowed to import a power of disposition. A power of disposition, such as is needful to defeat the limitation over to the husband, should appear, we think, in more express terms. But rules of interpretation, formerly adhered to with much strictness, have been changed, or modified, or abandoned, when, in their modern applications, they have been found hostile to the end the courts struggle to attain, which is to give effect to the grantor's intention, and to effect which they make it the paramount rule to read the who'e instrument, and, if possible, give effect and meaning to all its language. The granting clause of the deed in question contains the words "grant, bargain and sell," which, in the absence of other clauses restricting, limiting, or modifying the same, would, under our statute, constitute a deed of warranty with full express covenants, and, as said by counsel, if the deed in question stopped here, it would, when duly signed and sealed, have conveyed the fee. But the deed does not stop here. The clause above quoted is added and we are asked to adjudge the limitation over void, and to hold that, by the deed, it was the intention of the grantor to vest the fee in her daughter, free from the control of her husband, and the claims of creditors, and at the same time, and by the same instrument to provide that, upon the death of the

Bean v. Kenmuir.

daughter, the entire estate, or fee, thus already vested, should then pass to and become vested in her husband. While it is conceded that this could not be legally done, we are nevertheless asked to say that it was the manifest intention of the grantor to make or create both these estates. The manifest intention, as gathered from the face of the entire deed in question, is, we think, to convey the property to Neamie J. Talley, for her sole use and benefit, during her natural life, and to give a remainder over to the husband, and there is, we think, no imperative rule of construction, which forbids us to make the intention of the parties effectual. 60 Ind. 334; 29 Ind. 475; 40 Ga. 342; 19 Ohio St. 490; 44 Vt. 233; 51 Md. 180; 10 Cal. 105; 30 Cal. 346; 47 Cal. 151; 22 Vt. 104; *Russell v. Eubanks*, 84 Mo. 82; 67 Mo. 596.

In these views, the majority of the court, Judges Norton, Sherwood and Black, concur and so hold. Henry, C. J., and the writer dissent, holding that, under the well settled rules of construction, applicable to deeds like this, the first taker took the fee and that the limitation over is inoperative and void. 51 Mo. 57; 50 Mo. 186, 192; 5 Mass. 500; 2 Barb. 534; 3 Lev. 339; 5 Barn. & Cress. 709; Wash. on Real Prop., p. 436, or 642, side paging, sec. 60; 4 Kent's Com., side paging 468, or top paging (8 Ed.) 523, 524; 55 Wis. 96; 58 Miss. 690; *Russell v. Eubanks*, 84 Mo. 82.

This leads to an affirmance of the judgment of the circuit court, and it is so ordered.

Ferguson's Administrator v. Carson's Administrator.

FERGUSON'S ADMINISTRATOR V. CARSON'S ADMINISTRATOR, *Appellant*.

1. **Probate Court : APPEAL.** An appeal lies, under Revised Statutes, section 292, from the refusal of the probate court to make a preliminary order of publication for the sale of real estate to pay debts of the estate.
2. — — : **SALE OF REALTY TO PAY DEBTS.** When the petition for the sale of the real estate, and the accompanying lists and schedules are formal and regular, and the case thus made shows a proper cause for an order of sale, it is the duty of the court to make the order of publication. The law does not contemplate an investigation of the accounts, and an inquiry as to whether there is a deficiency of personal property, until after the proof of the order of publication, and all interested persons are thereby before the court.
3. **Surety, Payment of Judgment by.** While the payment of a judgment by a surety would, at law, extinguish the debt, and the surety could maintain his action of *assumpsit* for the amount paid the rule is otherwise in equity. In the latter forum the surety is entitled to be subrogated to all the securities held by the creditor has a right to be put in his place and to that end, although the judgment is against both the principal and surety, he may, for his exoneration, be subrogated to the judgment itself, and thus have the benefit of its lien and the priority it gave the creditor.
4. **Administration : DEBT AGAINST ESTATE : SURETY.** In the defence of an action commenced in the lifetime of the deceased for a debt then in existence, his administrator gave an appeal bond, and one F became surety for the estate thereon. Subsequently, F, as such surety, paid the judgment, and took an assignment of the same and presented his demand therefor against the estate. *Held*, that when the surety paid the debt it did not lose its character of a debt against the estate, and, therefore, was not within the rule prohibiting the allowance of any claim against the estate not in existence at the time of the death of the deceased.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

VOL. 86—43

Ferguson's Administrator v. Carson's Administrator.

Leonard Wilcox and Broadhead & Haeussler for appellant.

(1) The demand of plaintiff on the basis on which the notice was given was void, for it was a claim originating after the death of the claimant by his having paid a judgment rendered against the estate of deceased. *Trustees, etc., v. McElhinny*, 61 Mo. 542. (2) Moreover, the circuit court, which rendered the original judgment, never had jurisdiction over the person of defendant, as the cause was never revived against him during the time required by law, and the administrator could not give jurisdiction by his appearance at trial years after suggestion of death. *Beardslee v. Morgner*, 73 Mo. 22; *Rutherford v. Williams*, 62 Mo. 253. (3) The court, under the law, had no power to allow the demand in favor of the plaintiff. He never had a demand against Carson at the time of his death; he merely paid the demands for which he was administrator's security, by going through the form of taking an assignment to his attorney, Jamison. Neither the administrator, nor his attorney, had power to waive notice on such a claim, and let it be allowed fifteen years after administration granted; and moreover, judgment was paid. *McDowell v. Lee*, 37 Mo. 204; *Hull v. Sherwood*, 59 Mo. 172; *Wernecke v. Kenyon*, 66 Mo. 283. (4) Inasmuch as the settlements showed that the administrator had ample funds, or should have had them, on hand to pay the demand claimed by plaintiff, the creditor could not obtain an order of sale of the realty when a portion of that realty had already been sold, deed made by the administrator and his sister as residuary legatees, and the funds acknowledged to be in the hands of the administrator for the purposes of administration. To permit this to be done fifteen years after such sale and charge, would be a gross fraud on the purchaser. (5) The Webb purchase money was assets of the estate for which

Ferguson's Administrator v. Carson's Administrator.

the administrator was liable. *Dix v. Morris*, 66 Mo. 518; *Campbell v. Johnson*, 65 Mo. 439, 440; *Boyer v. Allen*, 76 Mo. 498; 3 Jarmon on Wills (5 Am. Ed.) 427. (6) The administrator improperly used \$5,140 of the money of the estate to pay off mortgage debts. 3 Jarmon on Wills (5 Am. Ed.) 474, 477; 3 Williams on Adm'r (6 Am. Ed.) 1801, 1803; 1 R. S., 1879, secs. 138, 149, 201, 230; *Lake, Adm'r v. Meier, Adm'r*, 42 Mo. 389; *Ross v. Julian*, 70 Mo. 209, 212; *Evans v. Snyder*, 64 Mo. 516; *Greene v. Holt*, 76 Mo. 678; *Cape Girardeau v. Harbison*, 58 Mo. 90; *Church v. McElhinny*, 61 Mo. 542; *Burdyne v. Mackey*, 7 Mo. 375. (7) The administrator paid out \$19,854 to special legatees and residuary legatees and devisees, which must be ignored in this proceeding. 1 R. S., 1879, secs. 243, 245. (8) The administrator should not be allowed credit for the sum of \$2,109, used to pay taxes on the real estate. *Wilcox v. Smith*, 26 Barb. 337; *McElhinny v. Church*, 61 Mo. 543; *Gray v. Clement*, 12 Mo. App. 579; *Burdyne v. Mackey*, 7 Mo. 374, 375. (9) The sum of \$1,363.52, used by the administrator to pay special tax bills, must be ignored. *In re Motier's Estate*, 7 Mo. App. 514, 518; *Higgins v. Ausmuss*, 77 Mo. 351. (10) The administrator had no authority to use the funds of the estate to repair or insure the real estate, and these credits must be disallowed. *In re Motier's Estate*, 7 Mo. App. 518; *Byrd v. Governor*, 2 Mo. 102; *Richie v. Withers*, 72 Mo. 559. (11) Not having brought the assets of the co-partnership of J. B. Carson & Brother into the present administration, the administrator cannot be allowed credit for demands against that co-partnership estate, especially as they were never presented or allowed. 1 R. S., 1879, sec. 201, 230.

E. T. Farish for respondent.

(1) Upon the showing made by the administrator, and under the evidence adduced at the hearing, it was

Ferguson's Administrator v. Carson's Administrator.

the duty of the court to make the order of publication required by R. S. sec. 148. (2) An appeal lay from the action of the probate court in refusing to make the order of publication. R. S., sec. 292; *McCrary v. Manteer*, 28 Mo. 446; *Duff v. Doyle*, 56 Mo. 301; *McVey v. McVey*, 51 Mo. 486; *Wilson v. Brown*, 21 Mo. 410. [3] There never was any payment or assignment of the Ober judgment, and it was a valid and subsisting demand in favor of Ferguson against the estate of Carson. When a surety pays a judgment against himself and the principal, he has a right to have it assigned to him, and to use it as a subsisting judgment against the principal. *Good-year v. Watson*, 14 Barbour [N. Y.] 481; *McDougald v. Dougherty*, 14 Ga. 674; *Alexander v. Lewis*, 1 Metcalf (Ky.) 407; *Creager v. Brengle*, 5 Har. 234; *Alden v. Clark*, 11 How. Pr. [N. Y.] 209; *Harbeck v. Vanberbilt*, 29 N. Y. 398. (3) It appearing that there was an unsatisfied judgment and no assets to pay it, the sale of real estate should have been ordered. The action of the probate court in refusing to make an order of publication was practically to deny the application for an order of sale.

BLACK, J.—In 1866 James O. Carson was appointed administrator, with the will annexed, of James B. Carson. The testator gave \$2,500 to each of his two step-daughters, and to a nephew one thousand dollars, to be paid as soon as practicable, and, if necessary, the executor was authorized to sell real and personal property for the payment of these amounts. The residue of his property, real and personal, he gave to his brother, James O. Carson, and sister, Mrs. Postlewaite.

In 1881 plaintiff, claiming to be a creditor of the estate, applied for an order of sale of real estate to pay debts. The administrator filed a statement showing the receipts and disbursements, disclosing a balance of \$5,638.18 due to him, the plaintiff's demand, and another unpaid debt of \$214.33. He also gave a schedule of the

Ferguson's Administrator v. Carson's Administrator.

real estate, and disclosed that there was no personal property on hand. The probate court refused to make the preliminary order of publication, and the plaintiff appealed to the circuit court with a like result, and then to the court of appeals, where the judgment of the circuit court was reversed, and the defendant then appealed.

1. The first question is, will an appeal lie from the probate court on this order? Section 292, Revised Statutes, allows an appeal from the decision of the probate court on all orders for sale of real estate, on the refusal of the circuit court to order sale of real estate to pay debts or legacies, and in all other cases where there shall be a final decision of any matter arising under the administration law. The refusal of the court to make the order of publication was a refusal, in effect, to make an order of sale, for the former is essential to the latter, and was, also, a final disposition of the matter of the creditor's petition, so that an appeal must lie from such an order.

2. The statute provides in detail what the petition for sale of real estate, and the accompanying lists and schedules shall state; and "when such petition and such accounts, lists and inventories shall be filed, the court shall order that all persons interested be notified," etc., and, "upon proof of publication, the court shall hear the testimony, and may, if necessary, examine all parties, on oath, touching the application, and make an order for the sale of such real estate, or any part thereof." If the administrator fail to make the application, the creditor may make it, and the administrator must file the accounts, lists, etc. The probate court may, of course, determine the sufficiency of these papers, but when the proceedings are formal and regular, and the case thus made shows a proper case for an order of sale, as was done here, it is the duty of the probate judge to make the order of publication. The law does not contemplate an investigation of the accounts, and an inquiry as to whether there is a

Ferguson's Administrator v. Carson's Administrator.

deficiency of personal property until after proof of the order of publication and all interested persons are before the court. The necessity of such notice before a hearing is forcibly demonstrated by the facts of this case. The court may, at the proper time, examine the merits of the application, whether there is any opposing interest or not. The order of publication should have been made, and the hearing, as to the order of sale, had at the proper time.

3. As this case must go back to the probate court, it will be proper to consider the other questions, as far as we can, which have led to this contest. The plaintiff, as a foundation of his demand, offered in evidence a transcript of some entries from the circuit court in a case of *Ober et al. v. John B. Carson*, which disclosed that an answer was filed by defendant in 1863, a suggestion of the death of defendant made in 1866, appearance of the administrator in 1876, and judgment for plaintiffs for over fifteen thousand dollars, and a credit thereon, and an assignment of the judgment to Mr. Glover. The balance of \$5,114.92 was classed in the sixth class of demands, by the probate court, on the twenty-first of March, 1879, in favor of the assignee. The demand was then again assigned to Mr. Jamison on April 19, 1879. The plaintiff also offered a demand against the estate allowed in her favor by the probate court on the fifteenth of July, 1879, which is as follows :

"To cash paid judgment rendered by St. Louis circuit court, March 30, 1879, against said estate, and in favor of Robert P. Ober *et al.*, and appealed by James O. Carson, administrator, to Supreme Court of Missouri, and from said court he appealed to Supreme Court of the United States, and classified March 21, 1879, in St. Louis probate court. The said William F. Ferguson was surety on said appeal bond to Supreme Court of the United States." Principal and interest, \$6,649.42.

The facts recited in this account do not appear to be

Ferguson's Administrator v. Carson's Administrator.

controverted. The evidence shows that Ferguson furnished the money with which to procure the assignment of the judgment from Glover to Jamison, and that the assignment was thus made to the latter in order to keep the judgment alive, as, by reason of the appeal bond, Ferguson stood as surety for the same debt. As matters stood at the date of the assignment to Jamison, an application was made for the sale of real estate to pay the debt, but the court then refused to make the order on the ground, among others, that the debt was paid. Thereupon, Ferguson had allowed in his favor the foregoing account, and then made the application now in question. He still relies upon the assigned account, and somewhat upon the allowed demand.

The objection made to the assigned account is, that it was paid by Ferguson, the surety, and to the allowed account that the allowance was void for want of jurisdiction in the probate court to make it, because a demand which arose subsequent to the death of the testator, John B. Carson. The payment of the judgment by the surety would, at law, extinguish the debt, and the surety would have his fresh action of *assumpsit* for the amount paid, but the rule is otherwise in equity; there the surety is entitled to be subrogated to all the sureties held by the creditor. In addition to this, in most states of this union, notwithstanding the rule asserted in *Copis v. Middleton*, T. & R. 224, the surety has a right to be put in the place of the creditor, and to that end may be subrogated to the judgment itself, though it be against both principal and surety, and to have the benefit of its lien and the priority which it gave the creditor for his exoneration. Adams' Eq. (4 Am. Ed.) 576, n. 1; Story's Eq. (8 Ed.) sec. 499 b, n. 3; 1 Lead. Cas. in Eq. (Hare & Wallace's Notes) 110. The broad statement of the rule has been several times recognized as the law in this state. *Furnold v. Bank*, 44 Mo. 336; *Allison v. Sutherlin*, 50 Mo. 277. Nor is there anything in the cases of *McDaniel v.*

Ferguson's Administrator v. Carson's Administrator.

Lee, 37 Mo. 204, or *Hull v. Sherwood*, 59 Mo. 172, or *Burton v. Rutherford*, 49 Mo. 255, which militates against this equitable doctrine. It is true, the surety in this case does not seek to enforce his rights as such by any proceeding in equity, but the estate of Carson is in administration, the demand has been allowed and received its rank among the other demands against the estate, and it was in this attitude when the surety paid it.

It would seem the legal holder of the debt ought to be treated as a trustee to receive the dividends and pay them to the surety, and especially as the avowed purpose in procuring the assignment was not to extinguish the debt in its then form. But be this as it may, the cause of action did not arise in favor of Ferguson until he paid the debt. He then had his demand allowed, treating it as a legal demand, and why may he not do this? It was said in *Trustees, etc., v. McElhinney*, 61 Mo. 540: "Under our statute respecting administration, and the repeated adjudications of this court thereon, probate courts possess no power to allow any claim against a decedent's estate, or to order the sale of land belonging thereto, except for the payment of debts of the deceased, *i. e.*, those in existence at the date of his death." Of the correctness of this proposition of law there can be no doubt, but it has no application to this case. There the debt was created by the executrix for her personal expenses, long after the death of the testator. Here the original debt was in existence and in suit at the death of Carson. In the defence of the suit the administrator found it necessary to give the appeal bond. Ferguson became the surety for the estate, and in its behalf. When he paid the debt and presented his demand, it did not lose its character as a debt of the estate. To hold otherwise is to put estates of deceased persons at a great disadvantage in procuring sureties when required in litigated causes. The debt thus allowed is a debt of the estate,

Kelly v. The C., R. I. & Pac. Ry. Co.

within the meaning of the administration laws, to pay which lands may be sold.

4. Much is said as to whether there is really a deficiency of personal property to pay the debts, and this grows out of the fact that James O. Carson and Mrs. Postlewaite, by their joint and individual deed, sold one parcel of property, and Carson, as administrator, charged himself in his accounts with the proceeds, and on the other hand took credit for large sums paid out of the proceeds of this sale to himself and Mrs. Postlewaite, as devisee, and for moneys paid out in procuring a one-fourth interest in the same parcel. There can be no difficulty in the accounts as between the administrator and the devisees and legatees. So far as this record shows, only one out of a vast number of parcels of property owned by the testator, has been sold by these residuary devisees, and we do not see any reason why that parcel should be disturbed. The unsold portions can be first exhausted. At all events, we cannot know what showing will be made when all the parties in interest have had an opportunity to be heard, and it would be most dangerous to adjudicate upon matters affecting the rights of others in advance of their being brought upon the record.

Affirmed. All concur.

KELLY, Appellant, v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY.

1. **Justice of Peace : APPEAL FROM : DISMISSAL OF SUIT.** Where, on an appeal from a justice of the peace, the transcript shows that the justice acquired jurisdiction of the defendant, it having filed its motion to set aside the judgment by default, a motion in the circuit

Kelly v. The C., R. I. & Pac. Ry. Co.

court to dismiss the suit because of service of summons in the wrong township, should not be sustained.

2. — : —. The circuit court should have proceeded under Revised Statutes, section 3052, to try the case *de novo*.

Appeal from Clinton Circuit Court.—HON. G. W. DUNN, Judge.

REVERSED.

B. J. Casteel for appellant.

The court erred in sustaining the motion to dismiss the case. Admitting that the justice had no jurisdiction over the person of defendant, he had jurisdiction of the subject matter, and when defendant appealed the case to the circuit court it waived the proper service of summons, and the circuit court got jurisdiction for all purposes, and should have proceeded to try and determine the case on its merits, *de novo*.

Shanklin, Low & McDougal for respondent.

HENRY, C. J.—This suit originated in a justice's court in Clinton county, and is for the recovery of double damages for the killing of a mare, the property of plaintiff. The mare was killed in Platte township, where the suit was commenced, and the summons was issued to a constable of that township, who (as is stated in the transcript of the justice), returned the same executed according to law. Not that that was the return made by the constable, but the judgment of the justice that the return of service was what the law required; judgment by default was rendered against the defendant in the justice's court, after which defendant appeared before the justice and filed a motion to set it aside, which was overruled, and defendant prosecuted

Kelly v. The C., R. I. & Pac. Ry. Co.

an appeal to the circuit court. In that court defendant filed a motion to dismiss the suit, on the ground that the justice had no jurisdiction of defendant's person, because the summons was served in Shoal township, and not in Platte township, although defendant, when said writ was issued and served, had a station and station agent in charge thereof in said Platte township.

The defendant's appearance in the circuit court was for the purpose of this motion only. The appearance of defendant in the justice's court was not a special appearance. The transcript of the justice on that point is as follows: "This twenty-sixth day of March, 1881, comes the defendant by its agent, W. E. Clark, and files motion to set aside judgment by default." It nowhere appears, except in an agreed statement of facts submitted with the motion in the circuit court, that the summons was served in Shoal, and not in Platte township. Upon the face of the transcript the justice had jurisdiction of defendant's person, and if the constable's return was false, the defendant had its action for a false return, but the justice's jurisdiction was complete. The agreed statement of facts should have been disregarded by the court, which should have overruled the motion and proceeded to try the cause *de novo*, instead of dismissing it. The case falls within section 3052, of the Revised Statutes, which is as follows:

"Upon the return of the justice being filed in the clerk's office, the court shall be possessed of the cause and shall proceed to hear, try and determine the same anew, without regarding any error, defect, or other imperfection in the *original summons or the service thereof, or on the trial, judgment, or other proceedings of the justice or constable in relation to the cause.*"

The judgment of the circuit court, dismissing the cause, is reversed, and it is remanded to be proceeded with in accordance with this opinion. All concur.

Vineyard v. Lynch.

VINEYARD V. LYNCH, *Appellant*.

1. **Actions Ex Delicto: JURISDICTION.** In actions *ex delicto* the damages claimed in the petition determine the jurisdiction of the court, and if the plaintiff recover any damages, he shall recover his costs. R. S., sec. 995.
2. ——— : ———. The test of jurisdiction in actions *ex delicto* is the aggregate amount of damages prayed for, and not the amount of damages prayed for in a single count. And this is true, whether the action be for a wrong in the nature of a tort or otherwise.
3. ——— : **SEVERAL COUNTS: COSTS.** In an action *ex delicto*, where the petition contains several counts, if the plaintiff recover any damages upon any count, the costs shall not be adjudged against him. R. S., sec. 995.

Appeal from Jefferson Circuit Court.—HON. JOHN L. THOMAS, Judge.

AFFIRMED.

Williams & Green for appellant.

(1) The cause of action alleged in each count of the petition is for damages, neither having any connection with or relation to the alleged causes of action stated in either of the other counts. The circuit court had no jurisdiction of any action where the amount claimed did not exceed fifty dollars, and, therefore, had none of the second count of plaintiff's petition, which was for damages for the killing of a sow, alleged to have been of the value of ten dollars. R. S., sec. 1102; *Smith v. Clark County*, 54 Mo. 58; *Hunt v. Hopkins*, 66 Mo. 98, and *Fickle v. Ry. Co.*, 54 Mo. 219, are not authorities against this position. (2) The court erred in overruling motion to re-tax costs. There were necessarily some costs resulting from the first and third counts.

Vineyard v. Lynch.

Thomas & Kleinschmidt for respondent.

The circuit court had jurisdiction. *Smith v. Clark Co.*, 54 Mo. 58; *Hunt v. Hopkins*, 66 Mo. 98; *Fickle v. St. L., K. C. & N. Ry. Co.*, 54 Mo. 219. Jurisdiction when once acquired is retained. 33 Mo. 409. The circuit court has discretionary power in regard to costs.

SHERWOOD, J.—Vineyard sued Lynch in the circuit court. His petition contained three counts, each for the malicious killing or wounding of certain domestic animals. The second count, which was based on the alleged malicious killing of a sow, stated her value at ten dollars. This suit was brought under the provisions of section 3928, relating to malicious trespass. Upon the cause being tried, the jury found for the plaintiff on the second count, and for the defendant on the others. Judgment was thereupon rendered for plaintiff in the sum of twenty dollars, double damages being lawful under the statute under which this suit was brought, and the whole of the costs were taxed against the defendant.

I. The motion in arrest, on the ground of lack of jurisdiction was, properly denied. It is expressly provided by statutes in actions *ex delicto* that damages claimed in the petition shall determine the jurisdiction of the court, and that if plaintiff recover any damages he shall recover his costs. R. S. 1879, section 995. This statute was passed upon at an early day in this state, and a ruling made in conformity with its plain provisions. *Acks v. Ball*, 14 Mo. 396. The test of jurisdiction in such cases is the aggregate amount of damages prayed for, and not the amount of damages prayed for in a single count. *Hunt v. Hopkins*, 66 Mo. 98, and cases cited.

Vineyard v. Lynch.

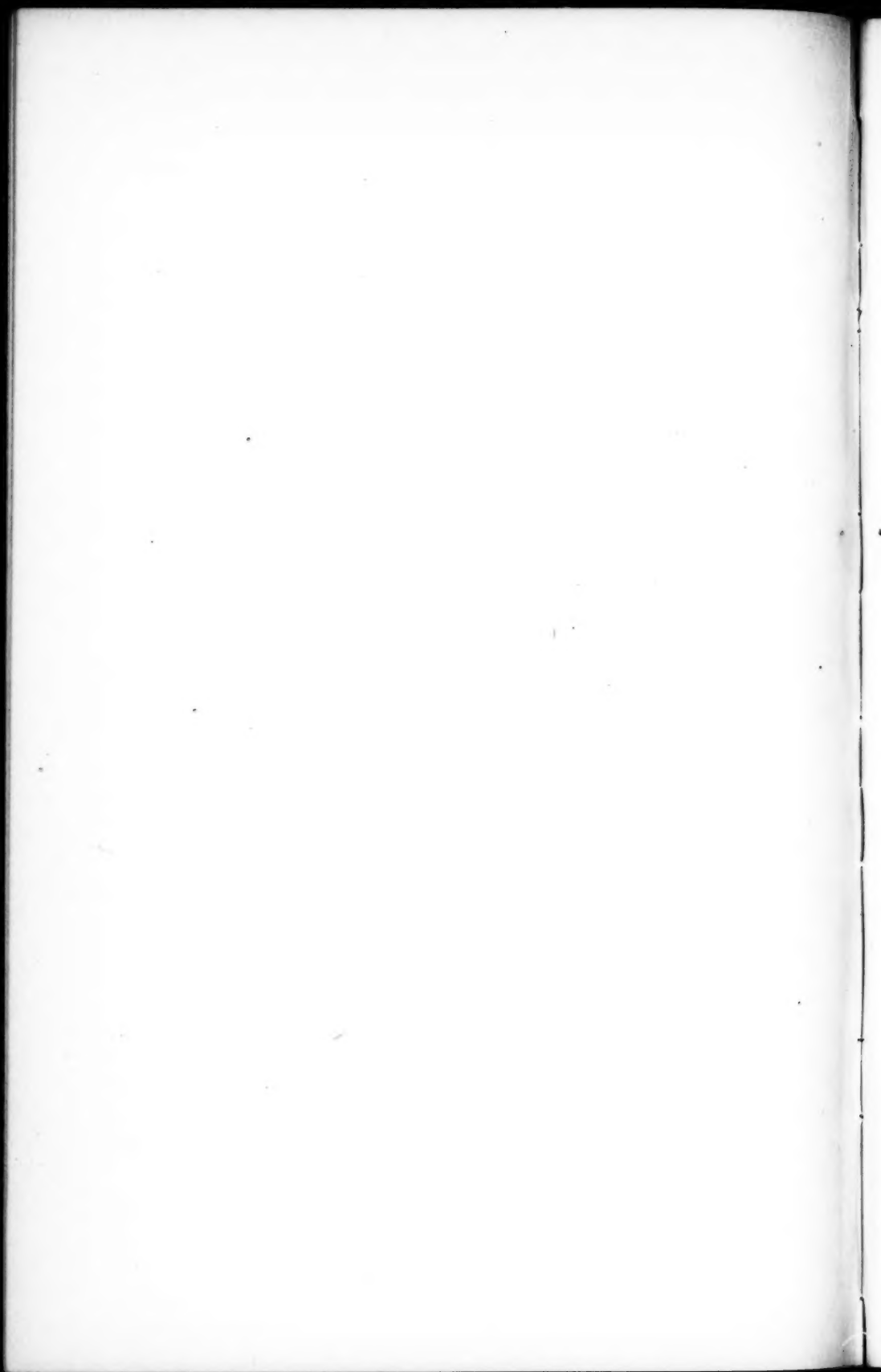
And the same rule applies, whether the action be for a wrong in the nature of a tort or otherwise. *Fickle v. Ry.*, 54 Mo. 219.

II. Nor was there error in denying the motion to re-tax costs. This is apparent for the reason already stated; the plaintiff's recovery of costs being based on section 995, *supra*. It will be observed that as to costs, a plain distinction is taken by the statute between actions *ex delicto* and those *ex contractu*, in regard to the matter of taxing costs; for in the next succeeding section in relation to actions of the latter nature, it is provided that, "if the plaintiff recover an amount which, etc., is below the jurisdiction of the court, * * * the costs shall be adjudged against him, unless the court shall be of opinion, from the evidence, that the plaintiff had at the time of the commencement of the suit, reasonable grounds," etc. Section 996. And even in a case of that sort, it has been ruled by this court that the matter of taxing costs rested largely in the discretion of the trial court, and that a refusal to tax them against the plaintiff was evidence that the trial court considered that the plaintiff had reasonable ground to believe, etc. *Hannan v. Shotwell*, 55 Mo. 429.

There is another statutory provision which may have some bearing on the point in hand, it is this: By section 3603, Revised Statutes, it is declared that "in all cases where there are separate causes of action united as aforesaid, the court shall award separate costs against the unsuccessful party, unless for good cause it shall otherwise order." Now, treating each count in the petition as the statement of the separate cause of action, still the action of the court may well be upheld; for, by parity of reasoning with the case last cited, it may well be assumed that the action of the trial court on the motion to re-tax was equivalent to an order based upon good cause refusing to award separate costs against the

Vineyard v. Lynch.

unsuccessful party. And this conclusion is all the more reasonable in this particular instance, by reason of the fact that no evidence has been preserved to abate the force of those reasonable presumptions and intendments which always attend the acts and doings of courts of general jurisdiction. Therefore, judgment affirmed. All concur.



INDEX.

ABATEMENT.

CORPORATION: STOCKHOLDER: ABATEMENT. A proceeding by motion under Revised Statutes, section 736, to subject a stockholder to execution on a judgment against the corporation to the extent of the unpaid balance of his stock, does not abate on the death of the stockholder. *Marks v. Hardy*, 232.

ACCRETIONS.

1. **LAND TITLE: ACCRETIONS.** Where the intermediate space between a survey on the main land of the Missouri river, and a surveyed island, at the times of the surveys, consisted of a slough, and since then the slough has so filled up as to connect the island and the main land, and to make them one continuous tract of land, the adjacent owners of the island and the survey are entitled to the accretions to their respective lands, but if the slough simply filled up from the bottom, or by deposits within its bed, and the accretions did not form on the one side or the other, then the center of the slough, as it was before the water left it, is the boundary between the survey and the island. *Buse v. Russell*, 209.
2. **ACCRETIONS.** Where the shore lines of two tracts of land, divided by a water course, receive accretions until they come together, the line of contact will then be the division line. *Ib.*
3. ———. If the slough gradually filled up as the water receded, the same principle is applied, and the new land belongs to the riparian owner, from whose shore the water receded, and it is immaterial whether the water was navigable in the common law sense or general acceptance of the term, or was a non-navigable stream. *Ib.*

ADMINISTRATION.

1. **ADMINISTRATOR: SALE OF REALTY TO PAY DEBTS: LIMITATION.** There is no statute of limitations in this state prescribing the time within which an administrator must procure an order for the sale of real estate to pay the debts of the estate, and, such being the case, he must do so within a reasonable time. *Gunby v. Brown*, 253.
2. ———: ———: **REASONABLE TIME.** What is a reasonable time must be determined from all the circumstances of the case; each particular case, to a great extent, furnishing its own rules. *Ib.*

3. ——— : ———. A delay of twelve or thirteen years after the granting of letters of administration, *held*, under the circumstances of this case, to be inexcusable. *Ib.*
4. INJUNCTION. Injunction will lie to prevent a sale under an order of the probate court obtained after such unreasonable delay. *Ib.*
5. PROBATE COURT : APPEAL. An appeal lies, under Revised Statutes section 292, from the refusal of the probate court to make a preliminary order of publication for the sale of real estate to pay debts of the estate. *Ferguson's Administrator v. Carson's Administrator*, 673.
6. ——— : SALE OF REALTY TO PAY DEBTS. When the petition for the sale of the real estate, and the accompanying lists and schedules are formal and regular, and the case thus made shows a proper cause for an order of sale, it is the duty of the court to make the order of publication. The law does not contemplate an investigation of the accounts, and an inquiry as to whether there is a deficiency of personal property, until after the proof of the order of publication, and all interested persons are thereby before the court. *Ib.*
7. ADMINISTRATION : DEBT AGAINST ESTATE : SURETY. In the defence of an action commenced in the lifetime of the deceased for a debt then in existence, his administrator gave an appeal bond, and one F became surety for the estate thereon. Subsequently, F, as such surety, paid the judgment, and took an assignment of the same and presented his demand therefor against the estate. *Held*, that when the surety paid the debt it did not lose its character of a debt against the estate, and, therefore, was not within the rule prohibiting the allowance of any claim against the estate not in existence at the time of the death of the deceased. *Ib.*

ADMINISTRATION : NOTICE OF EXHIBITION OF DEMAND : LIMITATION.
Wernse v. McPike, 565.

ADMISSIONS.

1. EVIDENCE : ADMISSIONS OF ONE IN POSSESSION OF LAND. The admissions of one, since deceased, respecting his title to land, made while in possession of the land, are competent evidence, even as against strangers. *Anderson v. McPike*, 293.
2. ADMISSIONS IN PLEADINGS : EVIDENCE : PRESUMPTION, REBUTTAL OF. *Prima facie* the original answer of a defendant in a cause is competent evidence against him. But the testimony of the attorney, whose name is signed to the answer, that defendant did not employ him in the cause, is sufficient to overthrow the presumption arising from his name being signed as defendant's attorney, and to exclude the answer as evidence. *Ib.*

ADVERSE POSSESSION.

1. TITLE BY ADVERSE POSSESSION. An actual, adverse, open, and con-

tinuous possession of land under a claim and color of right from 1836 to 1860 was sufficient, not only to bar recovery by those claiming under an elder title, but conferred title upon those claiming under such adverse possession. *Farrar v. Heinrich*, 521.

2. TRESPASS : ADVERSE POSSESSION. When both parties claim title by possession under color of title, the origin of each being an act of trespass, ~~the one~~ being a trespass on the constructive possession and the other a trespass on the actual possession under the later title, the same rule of law as to the title passing by adverse possession applies to each. *Ib.*

AGENT.

See PRINCIPAL AND AGENT.

ALLUVION.

See LAND AND LAND TITLES, 4.

AMENDMENT.

STREET IMPROVEMENTS : TAX-BILLS, AMENDMENT OF. It was competent for the city engineer of the city of St. Joseph, after making out tax-bills for macadamizing, curbing and guttering two streets, on discovering that the block had been subdivided into lots, to correct and certify anew the bills, and he could so do, whether he was out of office or was holding the same as his own successor. *Morley v. Weakley*, 451.

APPEAL.

1. ATTACHMENT : INTER-PLEA : APPEAL : SUPERSEDEAS : EXECUTION, WHEN OFFICER NOT LIABLE FOR FAILURE TO LEVY. The pendency of the appeal of an interpleader from the judgment of a justice of the peace in an action of attachment, where bond is given by the interpleader, operates as a *supersedeas* in the cause, and prevents the sale of the attached property pending such appeal, and an officer is not liable in such case for failure to levy an execution issued against the property interpleaded. *The State ex rel. Boyington v. Ranson*, 327.
2. APPEAL FROM THE ST. LOUIS COURT OF APPEALS. Where an appeal lies to the Supreme Court from the St. Louis court of appeals, only because constitutional questions are involved, only such questions will be considered by the former court. *The Merchants' Insurance Company v. Hill*, 466.
3. PRACTICE : JURISDICTION : APPEAL. The circuit court does not, by granting an appeal, lose jurisdiction in a cause, and a bill of exceptions may be filed and acted upon after appeal granted. *Shaw v. Shaw*, 594.

4. PRACTICE IN SUPREME COURT: APPEAL. An appeal to the Supreme Court, which is not taken at the term final judgment is rendered, will be stricken from the docket. *The State v. Rhodes*, 635.
5. PROBATE COURT: APPEAL. An appeal lies, under Revised Statutes, section 292, from the refusal of the probate court to make a preliminary order of publication for the sale of real estate to pay debts of the estate. *Ferguson's Administrator v. Carson's Administrator*, 673.
6. JUSTICE OF PEACE: APPEAL FROM: DISMISSAL OF SUIT. Where, on an appeal from a justice of the peace, the transcript shows that the justice acquired jurisdiction of the defendant, it having filed its motion to set aside the judgment by default, a motion in the circuit court to dismiss the suit because of service of summons in the wrong township, should not be sustained. *Kelly v. The Chicago, Rock Island & Pacific Railroad Company*, 681.
7. ———: ———. The circuit court should have proceeded under Revised Statutes, section 3052, to try the case *de novo*. *Ib.*

ARREST.

See OFFICES AND OFFICERS, 4, 5.

ASSAULT.

1. COMMON ASSAULT: INSTRUCTION. An instruction for the state to the effect that if defendant assaulted W. by pointing a loaded gun at him in a threatening manner and cocking it within shooting distance of him, they should find defendant guilty of common assault, held erroneous. *The State v. Sears*, 169.
2. ———. An intention on the part of the accused to do the other party some bodily harm is essential to constitute an assault. *Ib.*

ASSIGNMENT.

1. ———: DIRECTORS, ASSIGNMENT BY FOR BENEFIT OF CREDITORS. Where there is nothing in the charter or general laws of the state forbidding it, the directors of an insolvent bank have the right to make an assignment for the benefit of its creditors. *Chew v. Ellingwood*, 260.
2. VOLUNTARY ASSIGNMENT: DEED, CONSTRUCTION OF. A deed of assignment professing to be made for the benefit of all the creditors of the assignor, whether named or not, although reciting, by way of consideration, the release of some of the creditors, but containing no stipulation that those only who have or shall sign the release shall share in the benefits of the assignment, does not fall within the rule that a deed of assignment is void which contains a stipulation for the release of the debtor, as a condition of receiving any benefit from the assignment. *Jeffries v. Bleckmann*, 350.

3. ———. Under our statute (W. S., p. 150, sec. 1), declaring every voluntary assignment of property to be for the benefit of all the creditors of the assignor in the proportion of their respective claims, it is unnecessary to mention the name or the amount of debt of a creditor to entitle him to a share in its proceeds. *Ib.*
4. ———: SALE BY ASSIGNEE WITHOUT ORDER OF COURT. The sale of property by the assignee without an order of court does not render the sale fraudulent, nor does such fact affect the validity of the deed of assignment. *Ib.*
5. ———: STATUTE. Where the statute relating to voluntary assignments for the benefit of creditors determines how the trust shall be administered, it will supersede details to that end contained in the deed. *Ib.*
6. REPLEVIN: TORT, ASSIGNMENT OF. Replevin will lie for the possession of mules stolen from the owner in favor of his assignee of the right of action therefor. Following *Snyder v. Railway*, post, 613; *Doering v. Kenamore*, 588.
7. TORT TO PROPERTY: ASSIGNABILITY OF ACTION FOR: CODE. A right of action arising from a tort to property is assignable under the code (overruling *Wallen v. Railway*, 74 Mo. 521; *Snyder v. The Wabash, St. Louis & Pacific Railway Co.*, 613).

See BANKRUPTCY, 3, 4, 5.

ATTACHMENT.

ATTACHMENT: INTERPLEA: APPEAL: SUPERSEDEAS: EXECUTION, WHEN OFFICER NOT LIABLE FOR FAILURE TO LEVY. The pendency of the appeal of an interpleader from the judgment of a justice of the peace in an action of attachment, where bond is given by the interpleader, operates as a *supersedeas* in the cause, and prevents the sale of the attached property pending such appeal, and an officer is not liable in such case for failure to levy an execution issued against the property interpleaded. *The State ex rel. Boyington v. Ranson*, 327.

ATTORNMMENT.

See LANDLORD AND TENANT.

BANK.

1. BOND: BANK: BOOK-KEEPER, DEFALCATION OF. The fact that the book-keeper of a bank has, with the consent of its cashier, taken its money not due him and applied it to his own use, will not relieve either the book-keeper or his sureties from liability in an action on his bond which contained a provision that he would truly account for all moneys belonging to the bank, and apply its funds to their proper uses. *Chew v. Ellingwood*, 260.

2. ———: ———. The bond was given for the benefit of the stockholders and creditors of the bank, and the fact that the cashier knew of or connived at the book-keeper's defalcation can constitute no defence. *Ib.*
3. BANK DIRECTORS, NEGLIGENCE OF. Nor would the negligence of the directors, whereby they failed to discover the defalcation of the book-keeper, constitute a defence to an action on the bond. *Ib.*
4. ———: DIRECTORS, ASSIGNMENT BY FOR BENEFIT OF CREDITORS. Where there is nothing in the charter or general laws of the state forbidding it, the directors of an insolvent bank have the right to make an assignment for the benefit of its creditors. *Ib.*

BANKRUPTCY.

1. BANKRUPTCY, DISCHARGE IN. A discharge in bankruptcy is not collaterally assailable. *Brown v. The Covenant Mutual Life Insurance Company*, 51.
2. BANKRUPT: DISCHARGE OF SURETY. C filed his voluntary petition to be adjudged a bankrupt, in May, 1878, and in November following, his wife proved up against his estate a note which he had executed to her with defendant as surety thereon, and the wife thereafter assented to the final discharge of the bankrupt. *Held*, that, as the note was executed prior to January 1, 1869, such consent of the wife was unnecessary, and was, therefore, inoperative and did not discharge the surety. *Clark v. Clark*, 114.
3. BANKRUPTCY: ASSIGNEE, POWERS OF: PRACTICE. An assignee in bankruptcy becomes entitled to the property of the bankrupt fraudulently conveyed, concealed, or inadvertently omitted, as well as that scheduled and surrendered: he acquires the title thereto by virtue of the proceedings in bankruptcy, and the deed of assignment, and is the proper party to sue for and recover the same. *Peery v. Carnes*, 652.
4. ———: ———: PRACTICE: TRUSTEE. So long as the proceedings in bankruptcy are pending, the assignee is the only proper person to sue, and the creditors are bound to assert their rights as such by and through the assignee, who is trustee for the creditors and the bankrupt, with power to collect the assets and convert the assigned property into money and distribute it among the creditors. When this is done, and the proceedings are brought to an end, his trust ceases, and whatever is left in his hands becomes the property of the bankrupt by operation of law, without any formal discharge of the assignee, or re-transfer. *Ib.*
5. ———: PRACTICE: BANKRUPT. After the assignee's trust has ceased and the bankrupt has been discharged, the latter is the proper party to sue for demands due himself, at the time he was adjudged a bankrupt. *Ib.*

BAWDY HOUSE.

See NUISANCE.

BILL OF EXCEPTIONS.

1. BILL OF EXCEPTIONS : MOTION FOR NEW TRIAL. A bill of exceptions is properly made up at the term of the court at which the motion for a new trial is overruled. And it is immaterial that such motion was overruled at the third term after it was filed without being continued from term to term by any special or general order of court. *Givens v. Van Studdiford*, 149.
2. ——— : TRANSCRIPT OF BILL OF EXCEPTIONS. The clerk of the trial court in making a transcript of the bill of exceptions cannot insert instructions not contained in nor called for by such bill. *The State v. Anderson*, 309.
3. ——— : BILL OF EXCEPTIONS: INSTRUCTIONS. The Supreme Court will not presume that proper instructions were given by the trial court for the defendant, where the bill of exceptions only discloses that instructions were given for the state, and that others were asked for by defendant and refused. *Ib.*

BILLS AND NOTES.

- 1 SETTLEMENT, IMPEACHMENT OF: NOTE. Where a settlement of accounts has taken place between parties and a note payable to a third person is given in satisfaction of the amount found to be due in an action on such note by the indorsee, the maker, without bringing all the parties interested into court, cannot impeach such settlement, nor show that the note was without consideration. *The First National Bank of Hannibal v. The North Missouri Coal and Mining Company*, 125.
2. CORPORATION, NOTE OF: ACTS OF AGENTS. The authority of a corporation or its officers to issue its promissory note need not be expressly given by its by-laws, or by formal resolution of the board of directors. Such authority can be inferred from the acquiescence of the corporation in, or the recognition by it of, the acts of its accredited officers in the regular course of its authorized business. *Ib.*

BOOK-KEEPER.

See BANK.

BOND.

1. BOND : BANK : BOOK-KEEPER, DEFALCATION OF. The fact that the book-keeper of a bank has, with the consent of its cashier, taken its money not due him and applied it to his own use will not relieve either the book-keeper or his sureties from liability in an action on

his bond which contained a provision that he would truly account for all moneys belonging to the bank, and apply its funds to their proper uses. *Chew v. Ellingwood*, 260.

2. ———: ———. The bond was given for the benefit of the stockholders and creditors of the bank, and the fact that the cashier knew of or connived at the book-keeper's defalcation can constitute no defence. *Ib.*
3. BANK DIRECTORS, NEGLIGENCE OF. Nor would the negligence of the directors, whereby they failed to discover the defalcation of the book-keeper, constitute a defence to an action on the bond. *Ib.*

See GUARDIAN AND WARD, 1.

BURDEN OF PROOF.

———: BURDEN OF PROOF: PRESUMPTION. If a party who has the means of information at hand makes the assertion that he relied on the statement of another, the burden is on him to establish the statement. For the law presumes that he who can see for himself, if he will but look, does look and find out for himself, and if he asserts the contrary, he cannot prevail without overcoming the presumption thus arising. *Anderson v. McPike*, 293.

CAPITAL STOCK.

See CORPORATIONS.

CERTIORARI.

See PRACTICE IN SUPREME COURT, 5.

CHAMPERTY.

CHAMPERTY. Unless the plaintiff's title, by which he seeks to enforce a right, is infected with a champertous agreement, he may proceed with his suit, and this is the case although such illegal contract may exist between the plaintiff and his attorney. A party will not be turned out of court because of a champertous contract, until he asks the aid of the court to enforce it. *Bent v. Priest*, 475.

CITATION.

See SHERIFF'S DEED, 1.

CITIES OF FOURTH CLASS.

1. CITIES OF FOURTH CLASS: POLICEMAN: RIGHT TO MAKE ARRESTS. A policeman in cities of the fourth class, in the absence of an ordinance giving him the authority, has no right, without a warrant,

to arrest a person for carrying concealed weapons. *The State v. Holcomb*, 371.

2. ——— : ——— : MURDER. Although the attempted arrest by the officer in such case was illegal, yet if the defendant killed the deceased with express malice, it constituted murder in the first or second degree, and not manslaughter. *Ib.*

CITY OF KANSAS.

CITY OF KANSAS : STREET RAILWAYS : ORDINANCE. Section one of the ordinance of June 29, 1880, of the City of Kansas, relating to street railways, does not require such railways, or any officer thereof, to pave the street on which their cars are operated. *The City of Kansas v. Corrigan*, 67.

CLOUD ON TITLE.

See EQUITY, 4.

COMPROMISE.

See COSTS.

CONDITIONAL SALE.

See SALE.

CONSTITUTIONAL LAW.

1. CONSTITUTION : IMPRISONMENT FOR DEBT. The provisions of the statute authorizing examination of an execution debtor, are not repugnant to the clause of the constitution inhibiting imprisonment for debt. *The State ex rel. Ames v. Barclay*, 55.
2. DEED, RECITALS IN : RETROSPECTIVE ENACTMENTS. It is competent for the legislature, by express enactment (Laws 1881, p. 171), to make the recitals in a mortgage, or deed of trust, *prima facie* evidence of the truth thereof, and it is not trenching upon private rights, nor an impairment of the obligations of contracts to apply such enactment to deeds previously executed. *Coe v. Ritter*, 277.
3. EVIDENCE, CHANGE IN RULES OF : CONSTITUTIONAL LAW : RETROSPECTIVE LEGISLATION. Rules of evidence, like other rules affecting the mere remedy, are subject to continuous modification and control by the legislature, and changes effected in these rules by legislative authority may be made applicable to existing causes of action, without trespassing upon constitutional prohibitions respecting retrospective enactments. *Ib.*
4. CONSTITUTIONAL LAW : RETROSPECTIVE LEGISLATION : IMPAIRMENT OF OBLIGATION OF CONTRACT. Section 736, Revised Statutes, 1879,

is not retrospective, and does not impair the obligation of the contract created by act of February 9, 1859. Laws, p. 74. It creates no new or additional liability or burden, and disturbs no vested rights, but creates a mere supplemental proceeding incident to a change in the remedy which it was competent for the legislature to provide. *The Merchants' Insurance Company v. Hill*, 466.

5. DOUBLE DAMAGE ACT, CONSTITUTIONALITY OF. The former decisions of this court holding that the double damage act (R. S., sec. 809), is not in contravention of either the state or federal constitution, sustained. *Phillips v. The Missouri Pacific Railway Company*, 540.
6. CONSTITUTIONAL LAW : CONSTRUCTION : PRESUMPTION. Acts of the legislature are presumed to be constitutional, and it is only where they manifestly infringe on some provision of the constitution that they can be declared void for that reason. In case of doubt, every possible presumption, not directly inconsistent with the language and subject, is to be made in favor of the constitutionality of the act. *Ib.*
7. REVISED STATUTES, SECTION 2835, CONSTITUTIONALITY OF. Section 2835, of the Revised Statutes, is not in violation of article four, section fifty-three, sub-division seventeen, of the constitution of Missouri, prohibiting the general assembly from passing "any local or special law regulating the jurisdiction of justices of the peace," nor is it a special act because directed against railroads alone. *Ib.*
8. RAILROADS : DOUBLE DAMAGE ACT, CONSTITUTIONALITY OF. The former decisions of this court, upholding the constitutionality of the double damage act, as regards both the constitution of this state and of the United States, sustained. *Hines v. The Missouri Pacific Railway Company*, 629.

CONSTRUCTION.

CONSTRUCTION OF STATUTE : REVISED STATUTES, SECTION 736. Section 736, Revised Statutes, 1879, substantially the same as General Statutes, 1865, section 11, page 328, the effect of which is that upon a *nulla bona* return to an execution against a corporation, execution may issue against any stockholder to the extent of the amount of the unpaid balance of his stock, by order of the court upon motion filed in open court after sufficient notice, is applicable to the stockholders of the Excelsior Insurance Company created by the act of February 9, 1859. Laws, p. 74. *The Merchants' Insurance Co. v. Hill*, 466.

CONTEMPT.

1. ——— : REFEREE : CONTEMPT. The referee appointed to conduct the examination under Revised Statutes, section 2410, has authority to commit the execution debtor for contempt where he refuses to answer proper questions. *The State ex rel. Ames v. Barclay*, 55.
2. ——— : ——— : ———. The fact that the debtor was a grand

juror at the time of the examination does not exempt him from the operation of the statute, he having appeared and submitted to such examination, and without having made any such suggestion until after he refused to answer the questions on other grounds. *Ib.*

CONTRACTS.

1. PERSONAL SERVICE, CONTRACT FOR. When one enters into a contract of service for another for a fixed salary, or compensation, he, *prima facie*, agrees to give the latter his entire time, and the rendition of service by the employe, as a notary public in the employer's business, does not make the latter liable for the statutory fees therefor, in the absence of an agreement or understanding to that effect, or a course of conduct between the parties showing such fees were not to be included in the employe's salary. *Leach v. The Hannibal & St. Joseph Ry. Co.*, 27.
2. ORDINANCE: STREET RAILWAY COMPANY: CONTRACT. Where an ordinance of a city, which grants to a horse railway company the privilege of using its streets, requires such railway to keep portions of the street, on which it operates, in good repair, the city cannot, by a subsequent ordinance, compel the company to pave such portions of its street with specified materials, or punish any one concerned for operating the cars of the company, where the paving was not done. Such later ordinance would be an interference with the contract between the city and the railway as contained in the ordinance granting the latter its franchise. *The City of Kansas v. Corrigan*, 67.
3. PRINCIPAL AND AGENT: SALE OF LAND: CONTRACT. The owner of real estate situated in Kansas City, in this state, wrote from Chicago, Illinois, where he resided, to his agent, at Kansas City, in terms as follows: "Your letter received last night; I will leave the sale of the lots pretty much with you: if the party, or any one, is willing to pay sixty dollars per foot, one-third cash and balance one and two years, interest seven per cent. per annum, and pay commission of sale, I think I am willing to have you make out a deed and I will perfect it; I think you have the deeds to those lots, have you not? If you think better to try spring market, hold till then: the party buying may want the abstract in full, which I believe I have at Rockford, and will sell much less than cost. The above price is only for the present. * * * It is understood that if I pay the taxes now due, that hereafter I am relieved from any taxes." *Held*, that the letter authorized the agent to make a contract for the present sale of the lots. *Smith v. Allen*, 178.
4. ———: ———. Where such agent has the power to sell, he has the authority to sign an agreement in his principal's name and to bind him thereby. *Ib.*
5. CONTRACT: STATUTE. The Laclede Gas Light Company had the power, under its charter, to contract with the city of St. Louis to light the city within certain defined limits, to make and vend gas and gas light, and to lay down pipes therein, and to exercise all other powers necessary to execute and carry out the privileges and powers so granted, and these powers were not withdrawn from the

company by the act of March 26, 1868 (Acts, p. —), but were, by said act, extended over the corporate limits of the city. *The St. Louis Gas Light Co. v. The City of St. Louis*, 495.

6. **CONTRACT: CONSTRUCTION OF LEASE.** Where, by the terms of a lease, the lessors agree to put in certain new machinery when needed, the necessity for the same to be decided by referees, in case the parties cannot agree, and the lessors refuse to join in selecting referees, the lessee may put in suitable machinery and charge the cost thereof to the lessors, and the latter cannot take advantage of their wrongful act in failing to join in the selection of referees. But the lessee will not be entitled to rental for the new machinery provided by him, nor to an allowance for losses incurred by him by reason of being unable to conduct his business while putting in the new machinery. *Cox v. Volkert*, 505.
7. **PAROL CONTRACT FOR SALE OF LANDS: SPECIFIC PERFORMANCE: STATUTE OF FRAUDS.** Where one seeks the specific performance of a parol contract for the sale of land, and makes out a case of part performance sufficient to take the case out of the statute of frauds, the court should find the balance due on the purchase price, if any, and on payment of the same into court vest the title in the vendee. *Webb v. Toms*, 591.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVEYANCES.

LIFE ESTATE, CONVEYANCE BY OWNER OF: REMAINDERMEN. A suit to enforce a deed, made by the owner of the life estate for the fee of land, cannot be maintained against the remaindermen, although they are the heirs of the grantor and the conveyance by the latter contained covenants of general and special warranty. *Barlow v. Delaney*, 583.

See DEEDS.

CORPORATIONS.

1. **CORPORATION, NOTE OF: ACTS OF AGENTS.** The authority of a corporation or its officers to issue its promissory note need not be expressly given by its by-laws, or by formal resolution of the board of directors. Such authority can be inferred from the acquiescence of the corporation in, or the recognition by it of, the acts of accredited officers in the regular course of its authorized business. *The First National Bank of Hannibal v. The North Missouri Coal and Mining Company*, 125.
2. **CORPORATION: STOCKHOLDER: ABATEMENT.** A proceeding by motion under Revised Statutes, section 736, to subject a stockholder to execution on a judgment against the corporation to the extent of

the unpaid balance of his stock, does not abate on the death of the stockholder. *Marks v. Hardy*, 232.

3. MOTION AGAINST STOCKHOLDER FOR UNPAID STOCK SUBSCRIPTION: DEATH OF STOCKHOLDER. While such execution cannot issue against the estate of the deceased stockholder on the final adjudication on the motion, yet such adjudication may be regarded as a demand against the estate, and be classed as such. *Ib.*
4. ———: RETURN OF NULLA BONA. If the officer having the execution against the corporation makes a part of the debt and returns the writ *nulla bona* as to the residue, a sufficient foundation is laid to proceed, under the statute, against the stockholder for such residue. *Ib.*
5. ———: SHERIFF'S RETURN TO EXECUTION AGAINST CORPORATION. It is not necessary, in order that the stockholder may be proceeded against, that the sheriff's return to the execution against the corporation should negative the ownership of all property whatever by it. A fair and substantial *nulla bona* return is all that is required. *Ib.*
6. CORPORATION: INCREASE OF CAPITAL STOCK, NOTICE OF: STATUTE. The certified copy of the statement of proceedings relative to the increase of the capital stock of a corporation, required by Revised Statutes, section 939, to be filed in the office of the secretary of state, must show the newspaper publication of the notice of the proposed increase of stock, as required by Revised Statutes, section 938, and if such certificate fails to show such fact the secretary of state has no authority to issue his certificate that the corporation has complied with the law made and provided for the increase of stock, and the amount to which said stock is increased. *The State ex rel. The Donnell Manufacturing Company v. McGrath*, 239.
7. ———: ———. The weekly newspaper notice, required by Revised Statutes, section 938, of the proposed increase of the capital stock of a corporation, was intended for the public at large, while the written, or printed notices, required by said section to be sent to each stockholder, are for the benefit of the stockholders. *Ib.*
8. BOND: BANK: BOOK-KEEPER, DEFALCATION OF. The fact that the book-keeper of a bank has, with the consent of its cashier, taken its money not due him and applied it to his own use, will not relieve either the book-keeper or his sureties from liability in an action on his bond which contained a provision that he would truly account for all moneys belonging to the bank, and apply its funds to their proper uses. *Chew v. Ellingwood*, 260.
9. ———: ———. The bond was given for the benefit of the stockholders and creditors of the bank, and the fact that the cashier knew of or connived at the book-keeper's defalcation can constitute no defence. *Ib.*
10. BANK DIRECTORS, NEGLIGENCE OF. Nor would the negligence of

the directors, whereby they failed to discover the defalcation of the book-keeper, constitute a defence to an action on the bond. *Ib.*

11. ———: DIRECTORS, ASSIGNMENT BY FOR BENEFIT OF CREDITORS. Where there is nothing in the charter or general laws of the state forbidding it, the directors of an insolvent bank have the right to make an assignment for the benefit of its creditors. *Ib.*
12. CORPORATION: SERVICE OF PROCESS: JUDGMENT BY DEFAULT. In order to support a judgment by default against a corporation, it must appear of record that the person, who, the return of the officer shows, was served with process, has such a relation to the corporation that service on such person was tantamount to service on the corporation. *Cloud v. Inhabitants of Pierce City*, 35.
13. ST. JOSEPH BOARD OF PUBLIC SCHOOLS: BONDS: AUTHORITY TO ISSUE. The St. Joseph board of public schools had authority, by virtue of General Statutes, 1865, chapter 47, section 11, to issue, during the years 1868 and 1871, its bonds to raise money to build school houses; and, also, to issue its renewal refunding bonds, under Revised Statutes, 1879, section 7034. *The St. Joseph Board of Public Schools v. Gaylord*, 401.
14. CONSTRUCTION OF STATUTE: REVISED STATUTES, SECTION 736. Section 736, Revised Statutes, 1879, substantially the same as General Statutes, 1865, section 11, page 328, the effect of which is that upon a *nulla bona* return to an execution against a corporation, execution may issue against any stockholder to the extent of the amount of the unpaid balance of his stock, by order of the court upon motion filed in open court after sufficient notice, is applicable to the stockholders of the Excelsior Insurance Company created by the act of February 9, 1859. *Laws*, p. 74. *The Merchants' Insurance Company v. Hill*, 466.
15. DIRECTORS OF CORPORATION: AGENTS AND TRUSTEES. The directors of a corporation are trustees and agents of it and the stockholders, and, in general, are governed by the same rules as are applied to trustees and agents. *Bent v. Priest*, 475.
16. ———: ———. By accepting the office a director of a corporation undertakes to give his judgment and influence to its interests in all matters in which he represents or professes to represent it. *Ib.*
17. ———: ———. The defendant, a director in a life insurance company, in consideration of certain railroad bonds delivered to his business partner, agreed to and did advocate and vote for the assignment of the company's policies to another company and for the reinsurance of the same in the latter company. *Held*, that so many of the bonds as defendant received belonged to the corporation of which he was a director, and on his failure to produce the same a judgment for their estimated value was rightly entered. *Ib.*
18. ———: ———. There could be a recovery only for the bonds received by the defendant, and not for those retained by his business

partner, the latter not being a party to the suit and having held no fiduciary relation with defendant's corporation. *Ib.*

19. STATUTE OF LIMITATIONS. The statute of limitations commenced to run against the corporation only from the time it had knowledge of the agreement and acquisition of the bonds. *Ib.*

COSTS.

1. COMPROMISE OF SUIT : JUDGMENT FOR COSTS. A court is not authorized to render a judgment for costs in carrying out a compromise of the parties to the suit, except in pursuance of a stipulation to that effect, entered of record, or the consent of the parties given in open court. *Murphy v. Smith*, 333.
2. ——— : SEVERAL COUNTS : COSTS. In an action *ex delicto*, where the petition contains several counts, if the plaintiff recover any damages upon any count, the costs shall not be adjudged against him. R. S., sec. 995. *Vineyard v. Lynch*, 684.

COUNSEL.

1. PRACTICE : REMARKS OF COUNSEL : NEW TRIAL. It is no ground for new trial that counsel in argument to the jury misrepresented the facts in evidence. It is for the jury in such case, to apply the correction. *The State v. Zumbunson*, 111.
2. ——— : ———. Neither language of invective, by counsel, when called forth by the character of the crime, which the evidence tends to disclose, nor urgent appeals to the triers of the facts to do their duty, will justify the Supreme Court in reversing a judgment. *Ib.*
3. ——— : REMARKS OF COUNSEL : DISCRETION OF TRIAL COURT. It is for the trial court to determine whether the counsel in the conduct of a case, and in argument to the jury, transcend the limits of professional duty and propriety. *Straus v. The Kansas City, St. Joseph & Council Bluffs Railway Company*, 421.

CRIMINAL LAW.

1. CRIMINAL LAW : LARCENY : POSSESSION. Defendant pastured cattle for one T. They escaped, and when they returned to T's there were two with them that did not belong to the latter. Defendant claimed the two as his and sold them to T. *Held*, in a prosecution against defendant for the larceny of the two, that this tended to prove that they had previously been in his possession. *The State v. Jackson*, 18.
2. ——— : VENUE, PROOF OF. Venue need not be proved by direct evidence, but may be proved indirectly. *Ib.*
3. ——— : LARCENY : VENUE. One who steals property in one county

and takes it into another may be indicted, tried and convicted in the latter county. Where one steals cattle in one county, and they escape from him, and he pursues them into another county, and there takes possession of them as his property, and disposes of them, as such, he is guilty of stealing the property in the latter county. R. S., sec. 1691. *Ib.*

4. ——— : FORGERY IN SECOND DEGREE : INDICTMENT. An indictment for forgery in the second degree under Revised Statutes, section 1406, examined and approved. *The State v. Yerger*, 33.
5. ——— : ——— : ———. In an indictment for forgery, it is not necessary to expressly allege that the name charged to have been forged was affixed to the forged instrument, when the latter is set forth according to its tenor and shows such to be the fact. *Ib.*
6. ——— : FORGERY : TENOR : PURPORT. Where the tenor of the forged instrument is exact, and complete, and sufficiently gives the purport, the purporting clause may be rejected as surplusage. *Ib.*
7. FORGERY : INDICTMENT : INTENT. It is not necessary to the validity of an indictment for forgery that it should charge an intent on the part of the defendant to defraud any particular person. *Ib.*
8. PRACTICE, CRIMINAL : PRESENCE OF DEFENDANT IN COURT DURING TRIAL. When the record in the appellate court shows that the defendant in a criminal cause was present at the commencement, or any other stage of the trial, it will be presumed, in the absence of evidence in the record to the contrary, that he was present during the whole trial. R. S., sec. 1891. *Ib.*
9. CRIMINAL LAW : FORGERY : EVIDENCE. An alleged forged instrument is properly admitted in evidence, where it is correctly described in the indictment, or set forth according to its tenor. *Ib.*
10. ——— : ——— : INDICTMENT. It is not necessary in an indictment for forging a check, to set out the indorsement thereon, as that is not charged to be forged, and has nothing to do with the forged instrument. *Ib.*
11. ——— : ——— : EVIDENCE : VENUE. The possession of a forged instrument, or the uttering of it by one in the county where the indictment is found, is strong evidence to show that the forgery of the instrument was committed by him in the same county. *Ib.*
12. MISDEMEANOR : OFFENCE, WHAT NECESSARY TO CONSTITUTE. There can be no offence or misdemeanor, except as the result of the violation of some duty plainly imposed by a competent law-making power. *The City of Kansas v. Corrigan*, 67.
13. CRIMINAL LAW : LARCENY : EVIDENCE. Defendant and his confederates inveigled the owner of horses into a sale stable, in St. Louis, where another confederate acted in the role of a buyer, and still another as a friend of all parties, in consummating a trade, and

while his confederates were endeavoring to trick the owner of the horses into believing that he had traded them for certain mules, which the owner refused to do, the defendant took the horses and went off with them against the will and remonstrance of the owner. *Held*, that defendant was properly convicted of grand larceny. *The State v. Zumbunson*, 111.

14. **INDICTMENT : FELONIOUS ASSAULT.** An indictment, under Revised Statutes, section 1263, charging that defendant assaulted another by pointing a gun at the latter with the intent to maim and kill him, is not defective in only alleging that the gun was loaded with gunpowder. Serious injury can be inflicted with a gun so loaded. *The State v. Sears*, 169.
15. **CRIMINAL LAW : FELONIOUS ASSAULT : INSTRUCTIONS.** The evidence was to the effect that defendant pointed a loaded rifle at one W, and threatened to shoot him if he did not leave a certain field of which he was in possession, and in which he was at work, and that defendant and W were then from thirty to fifty feet apart. There was no evidence as to whether one, with a gun so loaded, and at the distance stated from another, could have killed or maimed the latter. *Held*, that the court rightly refused to instruct the jury, for the defendant, that if they should believe from the evidence that, on account of the distance between the parties at the time, a discharge of the rifle by defendant, loaded as charged, could not have killed or maimed W, they should acquit. *Ib.*
16. **COMMON ASSAULT : INSTRUCTION.** An instruction for the state to the effect that if defendant assaulted W, by pointing a loaded gun at him in a threatening manner, and cocking it within shooting distance of him, they should find defendant guilty of common assault, *held*, erroneous. *Ib.*
17. ———. An intention on the part of the accused to do the other party some bodily harm, is essential to constitute an assault. *Ib.*
18. **CRIMINAL PRACTICE : ASSESSMENT OF PUNISHMENT.** Where the jury assess the punishment below the legal limit allowed by law for the offence of which they find the defendant guilty, it is the duty of the court to sentence the defendant according to the lowest limit prescribed by law in such case. *Ib.*
19. **INDICTMENT : PROSECUTOR.** Where an indictment is for a felony, the name of the prosecutor is not required to be endorsed thereon, although under the indictment the defendant may be convicted of an offence which is only a misdemeanor. *Ib.*
20. **CRIMINAL LAW.** One may bring on a difficulty and follow it up in a manner which will not justify the other party in killing him. *The State v. Anderson*, 309.
21. **CRIMINAL PRACTICE : DEFENDANT TESTIFYING.** A defendant who has testified is entitled to have instructions predicated on the facts sworn to by him just as if he were a disinterested witness. *Ib.*

22. THE EVIDENCE in this case held not to authorize an instruction for any degree of manslaughter. *Ib.*
23. CRIMINAL LAW : EVIDENCE. On the trial of one for murder, it is not competent for him to show by his statement, made at the time he purchased the pistol with which he killed the deceased, that his purpose in buying it was to kill mad dogs. *The State v. Holcomb*, 371.
24. ——— : MURDER : PRACTICE : INSTRUCTIONS. On a trial for murder, the court should not instruct for a grade of homicide not shown by the evidence. *The State v. Wilson*, 520.
25. ——— : PLEADING : PRACTICE : EVIDENCE. An indictment for felonious assault, under Revised Statutes, section 1262, and a series of instructions applicable to that offence approved, and the evidence in the case held sufficient to sustain a conviction. *The State v. Jones*, 623.
26. ——— : PRACTICE : INSTRUCTIONS. In a prosecution for felonious assault, under Revised Statutes, section 1262, where the evidence shows that grade of offence, it is not error to refuse to instruct that the defendant may be awarded a less degree of punishment than imprisonment in the penitentiary. *Ib.*

See PLEADING, CRIMINAL.

PRACTICE, CRIMINAL.

DAMAGES.

1. EJECTMENT : DAMAGES : STATUTE. The statute with respect to ejectment suits contemplates that damages may be declared for in the same suit and in the same count. *Roberts v. Nelson*, 21.
2. MALICIOUS PROSECUTION : DAMAGES. In an action for malicious prosecution, founded on a prosecution without probable cause of two of five counts of an information, the plaintiff, in order to recover actual damages, is not required to distinguish by his evidence the damages arising from the prosecution of the two counts sued on from those incident to the other counts. The defendant cannot, by uniting in the information groundless accusations with those for which probable cause might exist, escape liability because of the plaintiff's inability to adjust the damages between the two. *Boogher v. Bryant*, 42.
3. LEASING PROPERTY FOR BAWDY HOUSE : INJURY TO ADJOINING OWNER. To render the landlord responsible in such case to the adjoining owner for the depreciation in value of the latter's property resulting from such alleged nuisance, it must appear that he leased the property for the purpose of or knowing it would be used for a bawdy house and that he assented to the indecent conduct of the inmates, or continued the leasing after knowledge of the fact. *Givens v. Van Studdiford*, 149.

4. PUBLIC NUISANCE, PRIVATE ACTION FOR. While, as a general rule, it is true that the law does not give a private action for a public wrong, an exception to this exists where a private person suffers some damage over and beyond the rest of the community by reason of a public nuisance. *Ib.*
5. ——— : SPECIAL DAMAGE. In a private action for injury resulting from a public nuisance, the special damage suffered by the plaintiff must be averred and proved. *Ib.*
6. MEASURE OF DAMAGES. The loss of rents is a proper element of damages in an action against the lessor of a bawdy house by the owner of adjoining property for injury resulting to the latter from the nuisance. *Ib.*
7. ———. The depreciation in the value of the property, it having been sold at a forced sale during the continuance of the nuisance, is also a proper element of damages. *Ib.*
8. ——— : ——— : DAMAGES. The right of the servant to recover damages for injuries incurred in the use of defective machinery, depends upon proof that the injuries were so incurred, and that the master was aware of the defect, or that the use of reasonable care on his part would have disclosed the defect. *Covey v. The Hannibal & St. Joseph Railway Company*, 635.

See EJECTMENT, 2.

DEEDS.

1. SHERIFF'S DEED : JUDGMENT : NOTICE : CITATION. A sheriff's deed, based upon certain judgments of the county court for principal and interest due upon township school bonds, under Revised Statutes, 1855, where such judgments recite a notice, but not a citation, as provided for by Revised Statutes, 1855, page 1425, section 29, is void. *Roberts v. Nelson*, 21.
2. ——— : ——— : SALE. Such deed is void where the sale under the judgment is made at the sitting of the county court, instead of during a term of the circuit court. *Ib.*
3. ——— : ——— : ——— : DOWER. Where a sheriff's deed is based upon a judgment against the husband and a sale thereunder before his death, it will not deprive the widow of her dower, and until dower is assigned to her she will be entitled to the possession of the property. *Ib.*
4. STATUTE OF LIMITATIONS : DISABILITY OF MINORITY : DISAFFIRMANCE OF DEED BY HEIRS. Where a married woman, who is a minor, with the concurrence of her husband, conveys land which descended to her from her ancestor, and dies before attaining her majority, leaving as her sole heir the plaintiff, also a minor, the latter is vested with the right to disaffirm such conveyance, and has the statutory period of three years after attaining her majority

within which to do so, and the institution of an action within such time for the recovery of said land is a valid disaffirmance of the conveyance. *Harris v. Ross*, 89.

5. ———: ———: ———. The conveyance of the grantor and her husband was effectual to pass the title during their joint lives, or during his life, if a tenant by curtesy, and the wife not having survived the particular estate, no cause of action ever accrued to her, and the statute of limitations never commenced to run in her favor; the heir, therefore, was the first person entitled to sue, and against whom the statute first began to run, and, being an infant, she had the full statutory period within which to disaffirm the deed and commence her action. *Ib.*
6. TAX DEED: STATUTE. Where the statute prescribes a form for a tax deed, such form becomes a matter of substance and must be strictly followed. *Hopkins v. Scott*, 140.
7. ———: ———. Where the statute provides that the tax deed shall be substantially in the form prescribed such form must be substantially, although not literally, complied with. *Ib.*
8. ———: OMISSION OF RECITALS PRESCRIBED BY STATUTE. While it is not necessary, in the latter case, to make the recitals in the words employed in the prescribed form, yet it is necessary that the recitals required in such form be substantially made, and if not so made, such omission is fatal to the deed. *Ib.*
9. ———: ———. The omission in a tax deed of the words, "for the payment of taxes, interest and costs then due and unpaid on said real property," is fatal to such deed, the statute having prescribed a form containing such recital and requiring that the deed should substantially comply with the form. *Ib.*
10. STATUTE OF LIMITATIONS: VOID TAX DEED. A tax deed omitting such recital is void on its face, and the special three years statute of limitations does not run in favor of the person holding possession under such deed. *Ib.*
11. DEED, DESCRIPTION IN. The description in a deed was as follows: "Beginning on south side of Broadway, 520 feet west of the east line of the northwest quarter of the southeast quarter of section three, township forty-five, range twenty-one, in Pettis county, Mo., thence south 165 feet, thence east 120 feet, thence north 165 feet, thence west 165 feet, to the place of beginning." *Held*, that it was sufficient. *Coe v. Ritter*, 277.
12. ———: EVIDENCE. Where no uncertainty in description appears upon the face of a deed, but is shown by extrinsic evidence, it is then competent, by other extrinsic evidence, to apply the description in the deed to the land intended to be described. *Ib.*
13. DEED, RECITALS IN: RETROSPECTIVE ENACTMENTS. It is competent for the legislature, by express enactment (Laws 1881, p. 171), to make the recitals in a mortgage, or deed of trust, *prima facie* evi-

dence of the truth thereof, and it is not trenching upon private rights, nor an impairment of the obligations of contracts to apply such enactment to deeds previously executed. *Ib.*

14. VOLUNTARY ASSIGNMENT: DEED: CONSTRUCTION OF. A deed of assignment, professing to be made for the benefit of all the creditors of the assignor, whether named or not, although reciting, by way of consideration, the release of some of the creditors, but containing no stipulation that those only who have or shall sign the release shall share in the benefits of the assignment, does not fall within the rule that a deed of assignment is void which contains a stipulation for the release of the debtor, as a condition of receiving any benefit from the assignment, *Jeffries v. Bleckmann*, 350.
15. NOTICE: DEED. One who claims title through a deed which recites that the land is subject to an incumbrance, will be held to have been put on inquiry as to the nature and amount of such incumbrance when he purchased. *Bronson v. Wanzer*, 408.
16. LIFE ESTATE, CONVEYANCE BY OWNER OF: REMAINDERMEN. A suit to enforce a deed, by the owner of the life estate of the fee of land, cannot be maintained against the remaindermen, although they are the heirs of the grantor, and the conveyance by the latter contained covenants of general and special warranty. *Barlow v. Delaney*, 583.

DEED, CONSTRUCTION OF: HABENDUM: LIFE ESTATE: REMAINDER.
Bean v. Kenmuir, 606.

DEFAULT.

See JUDGMENTS, 11.

DESCRIPTION.

See DEEDS, 11.

DIRECTORS.

1. DIRECTORS OF CORPORATION: AGENTS AND TRUSTEES. The directors of a corporation are trustees and agents of it and the stockholders, and, in general, are governed by the same rules as are applied to trustees and agents. *Bent v. Priest*, 475.
2. ———: ———. By accepting the office, a director of a corporation undertakes to give his judgment and influence to its interests in all matters in which he represents or professes to represent it. *Ib.*
3. ———: ———. The defendant, a director in a life insurance company, in consideration of certain railroad bonds delivered to his business partner, agreed to and did advocate and vote for the assignment of the company's policies to another company and for the re insurance of the same in the latter company. *Held*, that so

many of the bonds as defendant received belonged to the corporation of which he was a director, and on his failure to produce the same a judgment for their estimated value was rightly entered. *Ib.*

4. ——— : ———. There could be a recovery only for the bonds received by the defendant, and not for those retained by his business partner, the latter not being a party to the suit and having held no fiduciary relation with defendant's corporation. *Ib.*

DOWER.

1. WIDOW'S RIGHT TO MANSION HOUSE : DOWER : EJECTMENT : RENTS AND PROFITS. The widow has the right to remain and enjoy the mansion house of her deceased husband, and the messuages and plantation thereto belonging, until dower is assigned to her; this right can only be terminated by the assignment of dower, and ejectment will lie to enforce her right of possession to such lands, and she is entitled to the whole of the rents where there is no outstanding lease at the date of her husband's death. *Roberts v. Nelson*, 21.
2. DEATH OF WIDOW PENDING SUIT : REVIVAL IN NAME OF ADMINISTRATOR : EJECTMENT : DAMAGES. Where the widow dies, pending an action of ejectment by her for the recovery of possession of the mansion house and messuages, the suit may be revived in the name of her administrator and recovery had for rents and profits, by way of damages, to the time of her death. *Ib.*
3. ——— : ——— : ——— : DOWER. Where a sheriff's deed is based upon a judgment against the husband and a sale thereunder before his death, it will not deprive the widow of her dower, and until dower is assigned to her she will be entitled to the possession of the property. *Ib.*

EJECTMENT.

1. WIDOW'S RIGHT TO MANSION HOUSE : DOWER : EJECTMENT : RENTS AND PROFITS. The widow has the right to remain and enjoy the mansion house of her deceased husband, and the messuages and plantation thereto belonging, until dower is assigned to her; this right can only be terminated by the assignment of dower, and ejectment will lie to enforce her right of possession to such lands, and she is entitled to the whole of the rents where there is no outstanding lease at the date of her husband's death. *Roberts v. Nelson*, 21.
2. DEATH OF WIDOW PENDING SUIT : REVIVAL IN NAME OF ADMINISTRATOR : EJECTMENT : DAMAGES. Where the widow dies, pending an action of ejectment by her for the recovery of possession of the mansion house and messuages, the suit may be revived in the name of her administrator, and recovery had for rents and profits, by way of damages, to the time of her death. *Ib.*
3. EJECTMENT, DAMAGES : STATUTE. The statute with respect to eject-

ment suits contemplates that damages may be declared for in the same suit, and in the same count. *Ib.*

4. ———. Where a plaintiff comes into possession of the premises after the commencement of his action of ejectment, and during its pendency, he is, nevertheless, entitled to a judgment for mesne profits, and for his costs. *Crispen v. Hannovan*, 160.
5. VERDICT. A verdict for plaintiff in ejectment is sufficiently definite in its description of the premises, if the boundary lines as fixed by the verdict can be traced thereon. *Buse v. Russell*, 209.
6. EJECTMENT : TITLE. The elder title, when the better one, must prevail in an action of ejectment. *Farrar v. Heinrich*, 521.

EJECTMENT : RECOVERY FOR IMPROVEMENTS. *The Hannibal & St. Joseph Railway Company v. Shortridge*, 662.

See HOMESTEADS AND EXEMPTIONS, 11.

ELECTION.

See HOMESTEADS AND EXEMPTIONS, 4, 5.

EQUITY.

1. MORTGAGE : AFTER-ACQUIRED PROPERTY : LEGAL TITLE : EQUITY. A mortgagee of chattels not *in esse*, or not owned by the mortgageor at the execution of the mortgage, will not pass the legal title to such after-acquired property, and the mortgagee, to render his lien effectual, must assert it in a court of equity. *France v. Thomas*, 80.
2. EQUITY : PURCHASER WITH NOTICE UNDER PURCHASER WITHOUT NOTICE. A purchaser with notice, from a *bona fide* purchaser for a valuable consideration without notice, is entitled to the same protection in equity against one seeking to overturn his title as the purchaser without notice. *Anderson v. McPike*, 293.
3. ——— : FRAUD IN OBTAINING JUDGMENT. Where a judgment is fraudulently obtained against one, in violation of a compromise agreement, any title acquired thereunder by the plaintiff in the suit, or by any one having notice of the injustice practiced in obtaining the judgment, is voidable in equity as against the defendant in such suit, or those claiming under him. *Murphy v. Smith*, 333.
4. FRAUDULENT JUDGMENT, SALE UNDER : REMOVAL OF CLOUD ON TITLE. The evidence in this case reviewed and held, reversing the finding of the trial court, that a purchaser at a sheriff's sale and his vendee bought with notice of the fraud practiced in obtaining the judgment, and the title asserted thereunder removed as a cloud on defendant's title by divesting it out of plaintiff and vesting it in defendant. *Ib.*

5. ———: ———: WHEN PURCHASE MONEY NOT RESTORED. Said relief granted in this case without requiring the defendant in this action to restore the purchase money paid at the sale, for the reasons that it was not paid in discharge of any lawful lien upon the land, and the defendant did not have the benefit of any part of it. *Ib.*
6. EQUITABLE ACTION: PRACTICE: JURY. A suit to subject land to the enforcement of a vendor's lien being an equitable one is properly triable by the court, and a jury cannot be demanded therein as a matter of right. *Bronson v. Wanzer*, 408.
7. ———: ———: ———. The court, however, in such suit, may, in its discretion, take the opinion of the jury upon a specific question of fact by an issue made up for the purpose, but it is not bound by the finding of the jury and may adopt or reject the same as it may deem proper. *Ib.*
8. JURISDICTION: EQUITY: POWER TO SET ASIDE JUDGMENT. The circuit court, being a court of original chancery powers in this state, has jurisdiction to enjoin the issuance of execution upon a judgment procured by fraud in the court of common pleas, notwithstanding such judgment has been affirmed by the Supreme Court. *The State ex rel. Phelan v. Engelmann*, 551.

EVIDENCE.

1. CRIMINAL LAW: LARCENY: POSSESSION. Defendant pastured cattle for one T. They escaped, and when they returned to T's there were two with them that did not belong to the latter. Defendant claimed the two as his and sold them to T. *Held*, in a prosecution against defendant for the larceny of the two, that this tended to prove that they had previously been in his possession. *The State v. Jackson*, 18.
2. EVIDENCE. Receipts given by the employe to the employer, stating that the sums therein mentioned were in full for all demands for work done during regular and irregular hours, in the employer's service, are admissible in evidence in an action for such fees, and are *prima facie* evidence of payment as therein expressed, and such receipts are also competent evidence to show the capacity in which the employe acted, and the relation he sustained to the employer. *Leach v. The Hannibal & St. Joseph Railroad Company*, 27.
3. CRIMINAL LAW: FORGERY: EVIDENCE. An alleged forged instrument is properly admitted in evidence, where it is correctly described in the indictment, or set forth according to its tenor. *The State v. Yerger*, 33.
4. ———: ———: ———: VENUE. The possession of a forged instrument, or the uttering of it by one in the county where the indictment is found, is strong evidence to show that the forgery of the instrument was committed by him in the same county. *Ib.*
5. ———: LARCENY: EVIDENCE. Defendant and his confederates

inveigled the owner of horses into a sale stable, in St. Louis, where another confederate acted in the role of a buyer, and still another as a friend of all parties, in consummating a trade, and while his confederates were endeavoring to trick the owner of the horses into believing that he had traded them for certain mules, which the owner refused to do, the defendant took the horses and went off with them against the will and remonstrance of the owner. *Held*, that defendant was properly convicted of grand larceny. *The State v. Zumbunson*, 111.

6. DEED, DESCRIPTION IN : EVIDENCE. Where no uncertainty in description appears upon the face of a deed, but is shown by extrinsic evidence, it is then competent, by other extrinsic evidence, to apply the description in the deed to the land intended to be described. *Coe v. Ritter*, 277.
7. DEED, RECITALS IN : RETROSPECTIVE ENACTMENTS. It is competent for the legislature, by express enactment (Laws 1881, p. 171), to make the recitals in a mortgage or deed of trust, *prima facie* evidence of the truth thereof, and it is not trenching upon private rights, nor an impairment of the obligations of contracts, to apply such enactment to deeds previously executed. *Ib.*
8. EVIDENCE, CHANGE IN RULES OF : CONSTITUTIONAL LAW : RETROSPECTIVE LEGISLATION. Rules of evidence, like other rules affecting the mere remedy, are subject to continuous modification and control by the legislature, and changes effected in these rules by legislative authority, may be made applicable to existing causes of action, without trespassing upon constitutional prohibitions respecting retrospective enactments. *Ib.*
9. MECHANIC'S LIEN : ACCOUNT OF DEMAND : EVIDENCE. In a proceeding to enforce a mechanic's lien, the lienor must stand or fall by the account which he files, and the dates and items which he specifies, and cannot defeat or postpone a prior lienor or incumbrancer by matter *in pais*. *Ib.*
10. FRAUDULENT REPRESENTATIONS : EVIDENCE. In an action for damages for fraudulent representations touching the financial condition of a third person, evidence of such representations to plaintiffs by defendant are admissible in evidence, if they were the means of inducing the plaintiffs to part with their property, as in that case there would be a fraud coupled with an injury. *Anderson v. Mcpike*, 293.
11. EVIDENCE : ADMISSIONS OF ONE IN POSSESSIONS OF LAND. The admissions of one, since deceased, respecting his title to land, made while in possession of the land, are competent evidence, even as against strangers. *Ib.*
12. ADMISSIONS IN PLEADINGS : EVIDENCE : PRESUMPTION, REBUTTAL OF. *Prima facie* the original answer of a defendant in a cause is competent evidence against him. But the testimony of the attorney, whose name is signed to the answer, that defendant did not employ him in the cause, is sufficient to overthrow the presumption arising

from his name being signed as defendant's attorney and to exclude the answer as evidence. *Ib.*

13. FALSE REPRESENTATIONS: EVIDENCE. In an action for damages for fraudulent representations in the sale of land between a purchaser under a deed of trust and his grantors, a deed from the grantor in the deed of trust to a third person, made after the purchase at the sale under the trust deed and the subsequent sale by such purchaser, is irrelevant and inadmissible in evidence. *Ib.*
14. POLICEMAN: PROOF OF OFFICIAL CHARACTER. It is only necessary, in order to show that one was a policeman in a city of the fourth class, to prove that he acted and was recognized as such officer. It is unnecessary to produce his official appointment as policeman. *The State v. Holcomb*, 371.
15. CRIMINAL LAW: EVIDENCE. On the trial of one for murder, it is not competent for him to show by his statement, made at the time he purchased the pistol with which he killed the deceased, that his purpose in buying it was to kill mad dogs. *Ib.*
16. PRACTICE: EVIDENCE: OPINION OF WITNESS. It is not reversible error for a non-expert witness, who testifies to the facts in a case, to give an opinion based upon such facts. *Straus v. The Kansas City, St. J. & C. B. Ry. Co.*, 421.
17. ——— STREET IMPROVEMENT: LOST BID: EVIDENCE. Where a bid for macadamizing, etc., a street is lost, the loss being shown, parol evidence of its contents is admissible and the fact that no record or an imperfect account of the bid was kept, will not prevent plaintiff from showing its true contents. *Morley v. Weakley*, 451.
18. EVIDENCE. In an action by the gas company to recover from the city the contract price for gas supplied to the public lamps, and for services rendered in lighting lamps, the record kept by the city engineer, and the register kept by the gas inspector, are competent evidence. *The St. Louis Gas Light Company v. The City of St. Louis*, 495.
19. RESULTING TRUSTS: STATUTE OF FRAUDS: EVIDENCE. Resulting trusts are not within the statute of frauds, and parol evidence may be resorted to, to establish them, but to have that effect, such evidence must be almost conclusive in its character. *Shaw v. Shaw*, 594.
20. EVIDENCE: HUSBAND, COMPETENCY AS WITNESS. A husband, who is a co-plaintiff with his wife in an action under Revised Statutes, section 2121, for the death of their son, is a competent witness on the trial of the cause. *Bell v. The Hannibal & St. Joseph Railway Company*, 599.

See PERSONAL SERVICE, 4.

EXCELSIOR INSURANCE COMPANY.

CONSTRUCTION OF STATUTE: REVISED STATUTES, SECTION 736. Section 736, Revised Statutes, 1879, substantially the same as General Statutes, 1865, section 11, page 328, the effect of which is that upon a *nulla bona* return to an execution against a corporation, execution may issue against any stockholder to the extent of the amount of the unpaid balance of his stock, by order of the court upon motion filed in open court after sufficient notice, is applicable to the stockholders of the Excelsior Insurance Company created by the act of February 9, 1859. Laws, p. 74. *The Merchants' Insurance Company v. Hill*, 466.

EXECUTION.

1. EXECUTION DEBTOR: EXAMINATION OF TO DISCOVER PROPERTY: STATUTE. In an examination of an execution debtor, under Revised Statutes, section 2410, *et seq.*, to discover his assets, he can be required to disclose, not only that he has property, but where and in whose possession it is, and the terms upon which it is held. *The State ex rel. Ames v. Barclay*, 55.
2. ———: ———. The debtor cannot discontinue such examination by disclosing only so much property as he deems sufficient to satisfy the judgment. *Ib.*
3. ———: ———: IMPRISONMENT FOR DEBT. The provisions of the statute authorizing such examination of an execution debtor are not repugnant to the clause of the constitution inhibiting imprisonment for debt. *Ib.*
4. ———: REFEREE: CONTEMPT. The referee appointed to conduct the examination has authority to commit the execution debtor for contempt where he refuses to answer proper questions. *Ib.*
5. ———: ———: ———. The fact that the debtor was a grand juror at the time of the examination does not exempt him from the operation of the statute, he having appeared and submitted to such examination, and without having made any such suggestion, until after he refused to answer the questions on other grounds. *Ib.*
6. CORPORATION: STOCKHOLDER: ABATEMENT. A proceeding by motion under Revised Statutes, section 736, to subject a stockholder to execution on a judgment against the corporation to the extent of the unpaid balance of his stock, does not abate on the death of the stockholder. *Marks v. Hardy*, 232.
7. MOTION AGAINST STOCKHOLDER FOR UNPAID STOCK SUBSCRIPTION: DEATH OF STOCKHOLDER. While such execution cannot issue against the estate of the deceased stockholder on the final adjudication on the motion, yet such adjudication may be regarded as a demand against the estate, and be classed as such. *Ib.*
8. ———: RETURN OF NULLA BONA. If the officer having the execu-

tion against the corporation makes a part of the debt and returns the writ *nulla bona* as to the residue, a sufficient foundation is laid to proceed, under the statute, against the stockholder for such residue. *Ib.*

9. ———: SHERIFF'S RETURN TO EXECUTION AGAINST CORPORATION. It is not necessary, in order that the stockholder may be proceeded against, that the sheriff's return to the execution against the corporation should negative the ownership of all property whatever by it. A fair and substantial *nulla bona* return is all that is required. *Ib.*
10. EXECUTION, RETURN OF: PRESUMPTION. A return of a sheriff to an execution will be presumed to have been deposited with the clerk of the court on the return day, in the absence of anything to the contrary in such return or on the writ. *Ib.*
11. ———: ———. When the law fixes a day for the return of an execution, such return should not be made before that day. *Ib.*
12. ———: ———: PRIORITY. The creditor of a corporation can gain no priority by filing his motion for execution against a stockholder before the return day of the execution against the corporation. *Ib.*

See OFFICES AND OFFICERS.

EXECUTION DEBTOR.

See EXECUTION.

FELONIOUS ASSAULT.

1. INDICTMENT: FELONIOUS ASSAULT. An indictment under Revised Statutes, section 1263, charging that defendant assaulted another by pointing a gun at the latter with the intent to maim and kill him is not defective in only alleging that the gun was loaded with gunpowder. Serious injury can be inflicted with a gun so loaded. *The State v. Sears*, 169.
2. CRIMINAL LAW: FELONIOUS ASSAULT: INSTRUCTIONS. The evidence was to the effect that defendant pointed a loaded rifle at one W., and threatened to shoot him if he did not leave a certain field, of which he was in possession, and in which he was at work, and, that defendant and W. were then from thirty to fifty feet apart. There was no evidence as to whether one, with a gun so loaded and at the distance stated from another, could have killed or maimed the latter. *Held*, that the court rightly refused to instruct the jury for the defendant, that, if they should believe from the evidence that on account of the distance between the parties at the time, a discharge of the rifle by defendant, loaded as charged, could not have killed or maimed W., they should acquit. *Ib.*

See CRIMINAL LAW, 25, 26.

FORGERY.

1. CRIMINAL LAW: FORGERY IN SECOND DEGREE: INDICTMENT. An indictment for forgery in the second degree under Revised Statutes, section 1406, examined and approved. *The State v. Yerger*, 33.
2. ———: ———: ———. In an indictment for forgery, it is not necessary to expressly allege that the name charged to have been forged was affixed to the forged instrument when the latter is set forth according to its tenor and shows such to be the fact. *Ib.*
3. ———: FORGERY: TENOR: PURPORT. Where the tenor of the forged instrument is exact, and complete, and sufficiently gives the purport, the purporting clause may be rejected as surplusage. *Ib.*
4. FORGERY: INDICTMENT: INTENT. It is not necessary to the validity of an indictment for forgery that it should charge an intent on the part of the defendant to defraud any particular person. *Ib.*
5. CRIMINAL LAW: FORGERY: EVIDENCE. An alleged forged instrument is properly admitted in evidence where it is correctly described in the indictment, or set forth according to its tenor. *Ib.*
6. ———: ———: INDICTMENT. It is not necessary in an indictment for forging a check, to set out the indorsement thereon, as that is not charged to be forged and has nothing to do with the forged instrument. *Ib.*
7. ———: ———: EVIDENCE: VENUE. The possession of a forged instrument, or the uttering of it by one in the county where the indictment is found, is strong evidence to show that the forgery of the instrument was committed by him in the same county. *Ib.*

FRAUD.

1. EQUITY: FRAUD IN OBTAINING JUDGMENT. Where a judgment is fraudulently obtained against one, in violation of a compromise agreement, any title acquired thereunder by the plaintiff in the suit, or by any one having notice of the injustice practiced in obtaining the judgment, is voidable in equity as against the defendant in such suit, or those claiming under him. *Murphy v. Smith*, 333.
2. COMPROMISE OF SUIT: JUDGMENT FOR COSTS. A court is not authorized to render a judgment for costs in carrying out a compromise of the parties to the suit, except in pursuance of a stipulation to that effect entered of record, or the consent of parties given in open court. *Ib.*
3. FRAUDULENT JUDGMENT, SALE UNDER: REMOVAL OF CLOUD ON TITLE. The evidence in this case reviewed and held, reversing the finding of the trial court, that a purchaser at a sheriff's sale and his vendee bought with notice of the fraud practiced in obtaining the judg-

ment and the title asserted thereunder, removed as a cloud on defendant's title by divesting it out of plaintiff and vesting it in defendant. *Ib.*

4. PAROL CONTRACT FOR SALE OF LANDS : SPECIFIC PERFORMANCE : STATUTE OF FRAUDS. Where one seeks specific performance of a parol contract for the sale of land, and makes out a case of part performance sufficient to take the case out of the statute of frauds, the court should find the balance due on the purchase price, if any, and on payment of the same into court, vest the title in the vendee. *Webb v. Toms*, 591.
5. RESULTING TRUSTS : STATUTE OF FRAUDS : EVIDENCE. Resulting trusts are not within the statute of frauds, and parol evidence may be resorted to to establish them, but to have that effect such evidence must be almost conclusive in its character. *Shaw v. Shaw*, 594.

FRAUDULENT REPRESENTATIONS.

1. FRAUDULENT REPRESENTATIONS : EVIDENCE. In an action for damages for fraudulent representations touching the financial condition of a third person, evidence of such representations to plaintiffs by defendant are admissible in evidence, if they were the means of inducing the plaintiffs to part with their property, as in that case there would be a fraud coupled with an injury. *Anderson v. McPike*, 293.
2. ——— : PRACTICE : INSTRUCTIONS. In the trial of an action for damages for fraudulent representations touching the financial condition of a person, the jury should not be left to conjecture as to what are material false statements. *Ib.*
3. FRAUDULENT REPRESENTATIONS, RELIANCE UPON. Where a party to whom fraudulent representations are made does not rely upon them, but seeks information from other quarters to verify the statements made, he cannot afterwards claim that a deceit has been practiced upon him by the party originally making the representations. *Ib.*
4. ——— : BURDEN OF PROOF : PRESUMPTION. If a party who has the means information at hand makes the assertion that he relied on the statement of another, the burden is on him to establish the statement. For the law presumes that he who can see for himself, if he will but look, does look and find out for himself, and if he asserts the contrary, he cannot prevail without overcoming the presumption thus arising. *Ib.*
5. FRAUDULENT REPRESENTATION : KNOWLEDGE OF PERSON MAKING : PRESUMPTION. Fraud is not established and relief will not, in general, be granted without proof that the party who made the false representation knew at the time it was false. The law raises no presumption of knowledge from the mere fact that the representation is false. *Ib.*

6. **FALSE ASSERTION OF VALUE: WARRANTY: OPINION.** A mere false assertion of value, where no warranty is intended, is no ground of relief to a purchaser, because such assertion is a mere matter of opinion, which does not imply knowledge and is a thing about which men may differ. Mere expression of judgment or opinion does not amount to warranty. *Ib.*
7. **FALSE REPRESENTATIONS: EVIDENCE.** In an action for damages for fraudulent representations in the sale of land between a purchaser under a deed of trust and his grantors, a deed from the grantor in the deed of trust to a third person, made after the purchase at the sale under the trust deed, and the subsequent sale by such purchaser, is irrelevant and inadmissible in evidence. *Ib.*

FALSE REPRESENTATIONS.

See FRAUDULENT REPRESENTATIONS

GENERAL ASSEMBLY.

GENERAL ASSEMBLY. One general assembly cannot prescribe the manner or the language by which a subsequent general assembly shall amend, alter or repeal a law passed by the former. *The St. Joseph Board of Public Schools v. Gaylord*, 401.

GIFT.

1. **PERSONAL PROPERTY: GIFT.** Delivery of possession, either actual or constructive, is essential to a gift of corporeal personal property. *Doering v. Kenamore*, 598.
2. ——— : ———. Where such property is in the adverse possession of another, there can be no delivery, and, hence, no gift. *Ib.*

GRAND JURY.

CRIMINAL PRACTICE: GRAND JUROR: CHALLENGE OF. The challenge of a grand juror can be made only on the ground that the juror is the prosecutor or complainant, or a witness on the part of the prosecution. R. S., secs. 1772, 1773. *The State v. Holcomb*, 371.

GUARDIAN AND WARD.

1. **STATUTE OF LIMITATIONS: GUARDIAN'S BOND.** The statute of limitations begins to run against the ward, from the time of the guardian's final settlement, in an action on the latter's bond for failure to pay the amount found due the ward on such settlement. *The State ex rel. Yeoman v. Hoshaw*, 193.
2. **GUARDIAN AND WARD: FINAL SETTLEMENT: SURETIES.** The judgment for the ward against the guardian on the final settlement is

conclusive on the sureties on his bond, as it is likewise conclusive for them against the ward. *Ib.*

HIGHWAYS.

See ROADS AND HIGHWAYS.

HOMESTEAD AND EXEMPTIONS.

1. HOMESTEAD. The owner of a homestead, which is not liable to execution for a debt against him, can convey it to a purchaser, who will take it exempt from the same liability. *Holland v. Kreider*, 59.
2. ———. The law in force, at the time of the death of the husband, determines the homestead rights of the widow. *Davidson v. Davis*, 440.
3. DEVISE OF LAND TO WIDOW: HOMESTEAD. A widow cannot take a devise of land under her husband's will and also claim a homestead in his lands. *Ib.*
4. ———: ———: ELECTION. In such case she must make her election, but no formal act of election on her part is required, and it may be determined from her acts and conduct whether she chooses to accept the provisions of the will or to take a homestead. *Ib.*
5. ———. The widow's right of election in such case is not transmissible to her heirs. *Ib.*
6. CONSTRUCTION OF STATUTE: HOMESTEAD: TENANTS IN COMMON. Under section 2291, Revised Statutes of United States, where both father and mother die before perfecting an entry of a homestead, and receiving a patent therefor, their heirs are entitled to a patent upon making proof of the facts required by said section, and take as tenants in common. *Crumb v. Hambleton*, 501.
7. HOMESTEAD, RIGHT OF WIDOW TO ALIENATE. Under Revised Statutes, section 2693, the homestead vests in the widow and minor children, upon the death of the husband, and continues for their joint benefit until the youngest child shall have attained its legal majority, and the widow has no right to dispose of, abandon or otherwise deal with it to the impairment of the children's right to use it as a homestead. *Rhorer v. Brockhage*, 544.
8. ———: RIGHT OF WIDOW AND MINOR CHILDREN TO. Under the present law (R. S., sec. 2693) the widow and minor children are entitled to a homestead, regardless of whether or not the decedent left any debts. *Ib.*
9. ———: RIGHTS OF MINOR CHILDREN. The rights of the minor children in the homestead are in no manner affected by its abandon-

ment by the mother. Although they may accompany her to another home, their rights in the homestead continue. *Ib.*

10. ———: FAILURE OF OFFICER TO ASSIGN: SALE NOT VOID. The failure of a sheriff, selling, under execution, land which contains a homestead, to assign such homestead to the debtor does not render the sale void. *Crisp v. Crisp*, 630.
11. ———. The court may, in ejectment brought for the premises by the purchaser at the sale, cause the homestead to be assigned. *Ib.*

HUSBAND AND WIFE.

1. WIFE'S CHATTELS, WAIVER OF RIGHT TO BY HUSBAND, AT COMMON LAW. While, at common law, the chattels of the wife, vested in the husband by virtue of the marriage, yet he could waive his right thereto and permit her to retain them. He could, by his declarations, acts and dealings, release her property from his marital rights. *Clark v. Clark*, 114.
2. HUSBAND BORROWING WIFE'S MONEY. Where, instead of asserting his claim, as husband, to his wife's money, he borrows the same, with the agreement and understanding that it is to be repaid or accounted for to her, he will, in equity, be regarded as her debtor. *Ib.*
3. ———: SURETY. Where the husband receives money from the wife and executes to her therefor his note, with another as surety thereon, the transaction of itself shows that the money was not intended as a gift, and creates a valid obligation on the part of the husband to pay the note, which the wife can enforce against both him and the surety. *Ib.*
4. JUDGMENT, WRITTEN CONFESSION OF BY HUSBAND AND WIFE. A judgment rendered upon the mere written confession of a husband and his wife, filed in court, while it might be valid against the husband, can have no operation or force against the wife, whether it be regarded as simply a moneyed judgment against the wife, or as a judgment possessing attributes of that nature combined with others, which authorized a sale of her land for the enforcement of a mechanic's lien. *Per Sherwood, J. Coe v. Ritter*, 277.
5. HUSBAND AND WIFE: PRACTICE: RECEIPT. A receipt, by the husband, acknowledging satisfaction for the injury to the furniture, and for the payment by him of physicians' bills incurred by reason of the injuries to his wife, and for the expenses of a truss for her, is no bar to an action for the injuries to the wife's person. *Smith v. Warden*, 382.
6. ———. A husband, in the absence of authority from the wife, cannot now dispose of or settle her right of action for injuries done to her person. *R. S., 1879, sec. 3296. Ib.*

7. EVIDENCE: HUSBAND, COMPETENCY AS WITNESS. A husband, who is a co-plaintiff with his wife in an action under Revised Statutes, section 2121, for the death of their son, is a competent witness on the trial of the cause. *Bell v. The Hannibal & St. Joseph Railway Company*, 599.

INDICTMENT.

See PLEADING, CRIMINAL.

INJUNCTION.

INJUNCTION. Injunction will lie to prevent a sale under an order of the probate court obtained after unreasonable delay. *Gunby v. Brown*, 253.

INSTRUCTIONS,

1. INSTRUCTION. An instruction should not be given where there is no evidence to authorize it. *Brown v. The Covenant Mutual Life Insurance Company*, 51.
2. ———: INSTRUCTIONS. An instruction for murder in the second degree is properly refused where the evidence shows the offence to be murder in the first degree, or nothing. *The State v. Collins*, 245.
3. ———: PRACTICE: INSTRUCTIONS. In the trial of an action for damages for fraudulent representations touching the financial condition of a person, the jury should not be left to conjecture as to what are material false statements. *Anderson v. McPike*, 293.
4. CRIMINAL PRACTICE: MURDER: INSTRUCTION. On a trial for murder, an instruction is not erroneous which tells the jury that if they believe the defendants guilty of murder in the first or second degrees, but have a doubt as to which degree, they will give them the benefit of such doubt, and convict of the lesser degree. *The State v. Anderson*, 309.
5. ———: INSTRUCTION. An instruction held not erroneous because it did not confine the belief of the jury to the evidence, they having been sworn to try the case on the evidence, and it appearing they could not possibly have supposed they were permitted by the instruction to base their verdict upon anything but the testimony in the case. *Ib.*
6. ———: BILL OF EXCEPTIONS: INSTRUCTIONS. The Supreme Court will not presume that proper instructions were given by the trial court for the defendant where the bill of exceptions only disclosed that instructions were given for the state, and that others were asked for by the defendant and refused. *Ib.*

7. PRACTICE : INSTRUCTION. A party cannot complain of an instruction given at his own request. *Musser v. Adler*, 445.
8. INSTRUCTIONS : COMMENTING ON EVIDENCE. While an instruction should not comment on the evidence, nor single out one or more facts and give them undue prominence, yet an instruction in an action for the recovery of the value of services rendered as an attorney, is not so objectionable, which tells the jury that in considering the value of the plaintiff's services they should take into consideration the magnitude of the cases in which they were rendered, the skill required to perform the same so far as possessed by plaintiff ; the time required in the trial and preparation of the causes, and all the facts and circumstances touching the services so rendered. *Ib.*
9. CRIMINAL LAW : MURDER : PRACTICE : INSTRUCTIONS. On a trial for murder, the court should not instruct for a grade of homicide not shown by the evidence. *The State v. Wilson*, 520.
10. — : PLEADING : PRACTICE : EVIDENCE. An indictment for felonious assault, under Revised Statutes, section 1262, and a series of instructions applicable to that offence approved, and the evidence in the case held sufficient to sustain a conviction. *The State v. Jones*, 623.
11. — : PRACTICE : INSTRUCTIONS. In a prosecution for felonious assault, under Revised Statutes, section 1262, where the evidence shows that grade of offence, it is not error to refuse to instruct that the defendant may be awarded a less degree of punishment than imprisonment in the penitentiary. *Ib.*

INTENT.

INTENT. An intention on the part of the accused to do the other party some bodily harm is essential to constitute an assault. *The State v. Sears*, 169.

See FORGERY, 4.

INTERPLEA.

See ATTACHMENT.

JUDGMENTS.

1. JUDGMENT, REVERSAL OF. Where a judgment is reversed with the usual mandate to restore the parties to the same condition in which they were before its rendition, it becomes mere waste paper, and the parties are allowed to proceed in the trial court to obtain a final determination of their rights in the same manner and to the same extent as if the cause had not been decided in the trial court. Neither party in the subsequent prosecution of the cause can suffer detriment or receive assistance from the former adjudication. *Crispen v. Hannoran*, 160.

2. **PRACTICE IN SUPREME COURT: JUDGMENT AGAINST A MARRIED WOMAN.** Where a judgment is erroneously rendered against a married woman, the Supreme Court can amend the same by striking out her name. *Ib.*
3. **GUARDIAN AND WARD: FINAL SETTLEMENT: SURETIES.** The judgment for the ward against the guardian on the final settlement is conclusive on the sureties on his bond, as it is likewise conclusive for them against the ward. *The State ex rel. Yeoman v. Hoshaw*, 193.
4. **JUDGMENT, WRITTEN CONFESSION OF BY HUSBAND AND WIFE.** A judgment rendered upon the mere written confession of a husband and his wife, filed in court, while it might be valid against the husband, can have no operation or force against the wife, whether it be regarded as simply a moneyed judgment against the wife, or as a judgment possessing attributes of that nature combined with others, which authorized a sale of her land for the enforcement of a mechanic's lien. *Per Sherwood, J. Coe v. Ritter*, 277.
5. **PRACTICE: PARTIES: JUDGMENT: ENFORCEMENT OF MECHANIC'S LIEN.** Where, in a proceeding to enforce a mechanic's lien, the trustee and beneficiary in a prior deed of trust are not made parties, the judgment will have no force or effect as to the beneficiary in, or purchaser under, the deed of trust, and the purchaser, at a sale upon the mechanic's lien, will only acquire the equity of redemption, and the right to the premises after the trust lien has been paid. *Ib.*
6. **JUDGMENT NUNC PRO TUNC: RIGHTS OF THIRD PARTIES.** A judgment, *nunc pro tunc*, will not be allowed to operate to the prejudice of the rights of third parties acquired in good faith between the time of the rendition of the original judgment and the entry of the judgment *nunc pro tunc*. *Ib.*
7. **JUDGMENT: EXECUTION: SALE.** A sale under an execution issued upon an original judgment, which conforms to a judgment *nunc pro tunc*, instead of such original judgment, is invalid. *Ib.*
8. **EQUITY: FRAUD IN OBTAINING JUDGMENT.** Where a judgment is fraudulently obtained against one, in violation of a compromise agreement, any title acquired thereunder by the plaintiff in the suit or by any one having notice of the injustice practiced in obtaining the judgment, is voidable in equity as against the defendant in such suit or those claiming under him. *Murphy v. Smith*, 333.
9. **COMPROMISE OF SUIT: JUDGMENT FOR COSTS.** A court is not authorized to render a judgment for costs in carrying out a compromise of the parties to the suit, except in pursuance of a stipulation to that effect entered of record, or the consent of parties given in open court. *Ib.*
10. **FRAUDULENT JUDGMENT, SALE UNDER: REMOVAL OF CLOUD ON TITLE.** The evidence in this case reviewed and held, reversing the finding of the trial court, that a purchaser at a sheriff's sale and his vendee

bought with notice of the fraud practiced in obtaining the judgment and the title asserted thereunder removed as a cloud on defendant's title by divesting it out of plaintiff and vesting it in defendant. *Ib.*

11. ——— : SERVICE OF PROCESS : JUDGMENT BY DEFAULT. In order to support a judgment by default against a corporation, it must appear of record that the person who the return of the officer shows was served with process, has such a relation to the corporation that service on such corporation was tantamount to service on the corporation. *Cloud v. Inhabitants of Pierce City*, 357.
12. JUDGMENT WITHOUT PROCESS. Where a party has not been brought into court by service of any process, a judgment rendered against him is *coram non judice*, and void. *Ib.*
13. JURISDICTION : PROCESS : JUDGMENT. Generally the recital of jurisdiction, or of service of process contained in the judgment will be construed in connection with the whole record, and will be deemed to refer to the kind of service shown by the other parts of the record. *Ib.*
14. ——— : ——— : ———. Where judgment has been rendered against a defendant corporation upon insufficient process, and the successor of such corporation appears in court and moves, for that reason, to set aside the judgment, and asks leave to plead to the plaintiff's petition, which is denied, such action does not, by relation, give jurisdiction where none existed before, nor confer on the judgment rendered a retrospective validity. *Ib.*

See PRACTICE, CIVIL, 37.

JURISDICTION.

1. JURISDICTION : PROCESS : PRACTICE. Where an original petition states a cause of action against individuals, as constituting a co-partnership, and the amended petition states one against a corporation, the latter, before the court can have jurisdiction to render judgment, must be in court on voluntary appearance, or be brought in by service of process, and this is the case, although the firm name was the same as that of the corporation, and the stockholders in the latter composed said firm. *Thompson v. Allen*, 85.
2. PROCESS, JURISDICTIONAL RECITAL OF IN RECORD, CONTRADICTION OF. Although the record contains the jurisdictional recital that "defendants have been duly served with process," it is competent to overthrow such recital by showing, by other parts of the record of equal dignity and importing equal verity, that such recital is untrue. And the return of the sheriff is a part of the record itself, and may, when radically defective, be used to rebut the presumption arising from recitals of service contained in other portions of the record. *Cloud v. Inhabitants of Pierce City*, 357.
3. JURISDICTION : PROCESS : JUDGMENT. Generally, the recital of jurisdiction or of service of process contained in the judgment, will be

construed in connection with the whole record, and will be deemed to refer to the kind of service shown by the other parts of the record. *Ib.*

4. — : — : —. Where judgment has been rendered against a defendant corporation upon insufficient process, and the successor of such corporation appears in court and moves, for that reason, to set aside the judgment and asks leave to plead to plaintiff's petition, which is denied, such action does not, by relation, give jurisdiction where none existed before, nor confer on the judgment rendered a retrospective validity. *Ib.*
5. RAILROAD : KILLING STOCK : JURISDICTION : JUSTICE OF PEACE. In an action brought before a justice of the peace against a railroad for double damages for killing stock, the fact that the killing occurred in the township where the suit was brought, or in an adjoining township, is a jurisdictional one. It is not sufficient that such jurisdictional fact be averred in the statement ; it must also be shown by the evidence. *Backenstoe v. The Wabash, St. Louis & Pacific Railway Co.*, 492.
6. — : — : —. Proof simply that the killing occurred within the corporate limits of a town is not sufficient to warrant the jury in finding that it occurred in the township charged in the statement. *Ib.*
7. PARTNERSHIP : RECEIVER, POWER OF COURT TO APPOINT : JURISDICTION. The circuit court has original jurisdiction in all matters of equity, and has inherent power, independent of any statute authorizing it, to appoint a receiver in the settlement of partnership affairs, where there is no statute depriving it of such power. *Cox v. Volkert*, 505.
8. JURISDICTION : EQUITY : POWER TO SET ASIDE JUDGMENT. The circuit court, being a court of original chancery powers in this state, has jurisdiction to enjoin the issuance of execution upon a judgment procured by fraud in the court of common pleas, notwithstanding such judgment has been affirmed by the Supreme Court. *The State ex rel, Phelan v. Engelmann*, 551.
9. — : MANDAMUS. Where the circuit court has jurisdiction, such jurisdiction cannot be questioned or controlled by mandamus, however erroneously it may be exercised. *Ib.*
10. PRACTICE : JURISDICTION : APPEAL. The circuit court does not, by granting an appeal, lose jurisdiction in a cause, and a bill of exceptions may be filed and acted upon after appeal granted. *Shaw v. Shaw*, 594.
11. ACTIONS EX DELICTO : JURISDICTION. In actions *ex delicto* the damages claimed in the petition determine the jurisdiction of the court, and if the plaintiff recover any damages he shall recover his costs. R. S., sec. 995. *Vineyard v. Lynch*, 684.
12. — : —. The test of jurisdiction in actions *ex delicto* is the

aggregate amount of damages prayed for, and not the amount of damages prayed for in a single count. And this is true, whether the action be for a wrong in the nature of a tort, or otherwise. *Ib.*

JURY.

1. PRACTICE, CRIMINAL: JURORS, PANEL OF. The fact that in a trial for murder, a panel of forty qualified jurors was procured on the sixth, when the cause was not to be tried until the tenth, constitutes no error, as the defendant, or his counsel, could have re-examined them on the tenth, if he had so desired, to ascertain whether any of them had become disqualified between the dates mentioned. *The State v. Collins*, 245.
2. ———: SEPARATION OF JURY. The temporary separation of a juror from his fellows, the juror being under the charge of an officer while the others remained locked in their room, and nothing being said to such juror about the trial, constitutes no ground for a reversal of the judgment. *Ib.*
3. ———: JURORS: OBJECTION TO PANEL AFTER VERDICT. It is too late after verdict to object to the panel of jurors, or to the manner of its selection. *Ib.*
4. ———: ———: PROVINCE OF JURY. Where counsel cannot agree as to the evidence in a cause, or misstate the evidence, in argument, to the jury, it is the peculiar province of the jury, and not of the court to determine what the evidence was. *Straus v. The Kansas City, St. Joseph & Council Bluffs Railway Company*, 421.

JURORS.

See JURY.

JUSTICES' COURTS.

1. RAILROAD: KILLING STOCK: JURISDICTION: JUSTICE OF PEACE. In an action brought before a justice of the peace against a railroad for double damages for killing stock, the fact that the killing occurred in the township where the suit was brought, or in an adjoining township, is a jurisdictional one. It is not sufficient that such jurisdictional fact be averred in the statement; it must also be shown by the evidence. *Backenstoe v. The Wabash, St. Louis & Pacific Railway Company*, 492.
2. ———: ———: ———. Proof simply that the killing occurred within the corporate limits of a town is not sufficient to warrant the jury in finding that it occurred in the township charged in the statement. *Ib.*
3. JUSTICE OF PEACE: APPEAL FROM: DISMISSAL OF SUIT. Where, on an appeal from a justice of the peace, the transcript shows that the justice acquired jurisdiction of the defendant, it having filed its motion to set aside the judgment by default, a motion in the cir-

cuit court to dismiss the suit because of service of summons in the wrong township, should not be sustained. *Kelly v. The Chicago, Rock Island & Pacific Railroad Company*, 681.

1. ——— : ———. The circuit court should have proceeded under Revised Statutes, section 3052, to try the case *de novo*. *Ib.*

LACHES.

- : ——— : LACHES. The profile and map of the route of the defendant company through the county was filed, as required by statute (G. S. 1865, p. 337), in the office of the clerk of the county court in April, 1878, and the present action to restrain the defendant from using the highway was instituted in January, 1882. *Held*, there was no such delay on the part of the county as to preclude it from asserting its rights against the company. *The State ex rel., Mahan v. The St. Louis, Keokuk & Northwestern Railway Company*, 288.

LACLEDE GAS LIGHT COMPANY.

See CONTRACTS, 5.

LAND AND LAND TITLES.

1. LAND TITLE : ACCRETIONS. Where the intermediate space between a survey on the main land of the Missouri river and a surveyed island at the times of the surveys consisted of a slough, and since then the slough has so filled up as to connect the island and the main land, and to make them one continuous tract of land, the adjacent owners of the island and the survey are entitled to the accretions to their respective lands, but if the slough simply filled up from the bottom, or by deposits within its bed, and the accretions did not form on the one side or the other, then the center of the slough, as it was before the water left it, is the boundary between the survey and the island. *Buse v. Russell*, 209.
2. ACCRETIONS. Where the shore lines of two tracts of land, divided by a water course, receive accretions until they come together, the line of contact will then be the division line. *Ib.*
3. ———. If the slough gradually filled up as the water receded, the same principle is applied and the new land belongs to the riparian owner, from whose shore the water receded, and it is immaterial whether the water was navigable in the common law sense or general acceptance of the term, or was a non-navigable stream. *Ib.*
4. LAND TITLE : ISLAND : ALLUVION. If the island was washed away, in whole or in part, after it was surveyed, and then reformed on the same head, the owner of it, as it was before it was so washed, would be entitled to it, but if it was washed away, and the land sought to be recovered was made by deposits to and against the survey of the main land, then such deposits became the property of the owner of the survey. *Ib.*

5. LAND AND LAND TITLES : TITLE BOND. SURRENDER OF. The holder of a title bond to land, who surrenders it to him who executed it, thereby obliterates whatever equitable right he may have theretofore had in the land. *Anderson v. McPike*, 293.
6. EVIDENCE : ADMISSIONS OF ONE IN POSSESSION OF LAND. The admissions of one, since deceased, respecting his title to land, made while in possession of the land, are competent evidence, even as against strangers. *Ib.*
7. TITLE TO LAND : UNRECORDED TITLE BOND : NOTICE. A purchaser of land for value, without notice of an unrecorded title bond, will take a clear title against any right growing out of such bond. *Ib.*
8. LAND, PURCHASE OF : POSSESSION : VENDOR AND VENDEE. Where the vendor of land, at the time of contracting, refuses to put the vendees in possession, and the conveyance is accepted on such terms, it is not the vendor's duty to put the vendees in possession. *Ib.*
9. LANDLORD AND TENANT : ATTORNMENT : POSSESSION : PURCHASER UNDER TRUST DEED. The purchaser of land at a trustee's sale, made at the request of the administrator of the beneficiary, acquires all the title of the mortgageor, and the beneficiaries under the trust deed, and as against them is entitled to the possession ; and a tenant, holding under authority of the administrator's lessee, who attorns to the purchaser, becomes the latter's tenant, and thereafter the tenant's possession is the possession of the purchaser. *Lindenbower v. Bentley*, 515.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT : ATTORNMENT : POSSESSION : PURCHASER UNDER TRUST DEED. The purchaser of land at a trustee's sale, made at the request of the administrator of the beneficiary, acquires all the title of the mortgageor and the beneficiaries under the trust deed, and as against them is entitled to the possession ; and a tenant, holding under authority of the administrator's lessee, who attorns to the purchaser, becomes the latter's tenant, and thereafter the tenant's possession is the possession of the purchaser. *Lindenbower v. Bentley*, 515.
2. — : — : LANDLORD AND TENANT. A tenant to whom land is rented is entitled to its exclusive possession, and being in exclusive possession, the landlord out of possession cannot maintain trespass. *Ib.*
3. POSSESSION OF TENANT : SECOND LEASE. The possession of a tenant is the possession of his lessor, and the fact that the parties claiming the adverse title without the knowledge of such lessor prevailed on tenant while so in possession under the first lease, to accept a lease from them, cannot affect the possession of such first lessor. *Farrar v. Heinrich*, 521.

4. ———: ———. The fact that the second lessors may have made their lease under the mistaken belief that the tenant was a squatter and in ignorance of the existence of the first lease, cannot affect the rights of the first lessor. *Ib.*
5. ———: ———. If neither party in fact knew, nor had reason to suspect the existence of the lease by the other, and although both acted in good faith in making their respective leases, still such facts cannot help the second lessor. In such circumstances the familiar doctrine and duty of the court is not to interfere, but to leave the parties as it found them. *Ib.*

LARCENY.

1. CRIMINAL LAW: LARCENY: POSSESSION. Defendant pastured cattle for one T. They escaped and when they returned to T's there were two with them that did not belong to the latter. Defendant claimed the two as his and sold them to T. Held, in a prosecution against defendant for the larceny of the two, that this tended to prove that they had previously been in his possession. *The State v. Jackson*, 18.
2. ———: LARCENY: VENUE. One who steals property in one county and takes it into another may be indicted, tried and convicted in the latter county. Where one steals cattle in one county, and they escape from him, and he pursues them into another county, and there takes possession of them as his property, and disposes of them, as such, he is guilty of stealing the property in the latter county. R. S., sec. 1691. *Ib.*
3. CRIMINAL LAW: LARCENY: EVIDENCE. Defendant and his confederates inveigled the owner of horses into a sale stable, in St. Louis, where another confederate acted in the role of a buyer, and still another as a friend of all parties, in consummating a trade, and while his confederates were endeavoring to trick the owner of the horses into believing that he had traded them for certain mules, which the owner refused to do, the defendant took the horses and went off with them against the will and remonstrance of the owner, Held, that defendant was properly convicted of grand larceny. *The State v. Zumbunson*, 111.

LEASE.

1. RECEIVER, EFFECT OF APPOINTMENT: LESSOR AND LESSEE. The appointment of a receiver does not affect the rights of parties to a lease executed by those for whom he acts, and whatever defences, counter-claims, or set-offs, the lessee would have had in a suit by the lessors are available to the lessee, in a suit by the receiver, and the lessee may plead any failure of the lessors to perform their part of the contract. *Cox v. Volkert*, 505.
2. CONTRACT: CONSTRUCTION OF LEASE. Where, by the terms of a lease, the lessors agree to put in certain new machinery when needed, the necessity for the same to be decided by referees, in case the parties cannot agree, and the lessors refuse to join in selecting referees, the lessee may put in suitable machinery and

charge the cost thereof to the lessors, and the latter cannot take advantage of their wrongful act in failing to join in the selection of referees. But the lessee will not be entitled to rental for the new machinery provided by him, nor to an allowance for losses incurred by him by reason of being unable to conduct his business while putting in the new machinery. *Ib.*

3. POSSESSION OF TENANT: SECOND LEASE. The possession of a tenant is the possession of his lessor, and the fact that the parties claiming the adverse title without the knowledge of such lessor prevailed on tenant while so in possession under the first lease, to accept a lease from them, cannot affect the possession of such first lessor. *Farrar v. Heinrich*, 521.
4. ———: ———. The fact that the second lessors may have made their lease under the mistaken belief that the tenant was a squatter and in ignorance of the existence of the first lease, cannot affect the rights of the first lessor. *Ib.*
5. ———: ———. If neither party in fact knew, nor had reason to suspect the existence of the lease by the other, and although both acted in good faith in making their respective leases, still such facts cannot help the second lessor. In such circumstances the familiar doctrine and duty of the court is not to interfere, but to leave the parties as it found them. *Ib.*

LESSOR AND LESSEE.

See LEASE.

LICENSE.

See ST. LOUIS CITY, 2.

LIEN.

VENDOR'S LIEN. One who buys land, subject to a vendor's lien, with notice of the same, takes it subject to such lien. *Bronson v. Wanzer*, 408.

See MECHANIC'S LIEN.

LIFE ESTATE.

1. RAILROAD: CONDEMNATION PROCEEDING: LIFE ESTATE. The owner of a life estate in land condemned for a right of way for a railroad, is entitled to the same estate in the money paid into court under the condemnation proceedings. *The Kansas City, Springfield & Memphis Railway Co. v. Weaver*, 473.
2. ———: ———: ———. A judgment creditor of the remainderman in such life estate can assert no claim to any part of said money during the continuance of the life estate. *Ib.*

3. LIFE ESTATE, CONVEYANCE BY OWNER OF: REMAINDERMEN. A suit to enforce a deed, made by the owner of the life estate for the fee of land, cannot be maintained against the remaindermen, although they are the heirs of the grantor, and the conveyance by the latter contained covenants of general and special warranty. *Barlow v. Delaney*, 583.

DEED, CONSTRUCTION OF: HABENDUM: LIFE ESTATE: REMAINDER. *Bean v. Kenmuir*, 666.

LIMITATIONS.

1. STATUTE OF LIMITATIONS: DISABILITY OF MINORITY: DISAFFIRMANCE OF DEED BY HEIRS. Where a married woman, who is a minor, with the concurrence of her husband, conveys land which descended to her from her ancestor, and dies before attaining her majority, leaving as her sole heir the plaintiff, also a minor, the latter is vested with the right to disaffirm such conveyance, and has the statutory period of three years after attaining her majority within which to do so, and the institution of an action within such time for the recovery of said land is a valid disaffirmance of the conveyance. *Harris v. Ross*, 89.
2. ———: ———: ———. The conveyance of the grantor and her husband was effectual to pass the title during their joint lives, or during his life, if a tenant by curtesy, and the wife not having survived the particular estate, no cause of action ever accrued to her, and the statute of limitations never commenced to run in her favor; the heir, therefore, was the first person entitled to sue, and against whom the statute first began to run, and, being an infant, she had the full statutory period within which to disaffirm the deed and commence her action. *Ib.*
3. STATUTE OF LIMITATIONS: VOID TAX DEED. A tax deed omitting the recital "for the payment of taxes, interest and costs then due and unpaid on said real property," is void on its face, and the special three years statute of limitations does not run in favor of the person holding possession under such deed. *Hopkins v. Scott*, 140.
4. STATUTE OF LIMITATIONS: GUARDIAN'S BOND. The statute of limitations begins to run against the ward, from the time of the guardian's final settlement, in an action on the latter's bond for failure to pay the amount found due the ward on such settlement. *The State ex rel. Yeoman v. Hoshaw*, 193.
5. ADMINISTRATOR: SALE OF REALTY TO PAY DEBTS: LIMITATION. There is no statute of limitations in this state prescribing the time within which an administrator must procure an order for the sale of real estate to pay the debts of the estate, and, such being the case, he must do so within a reasonable time. *Gunby v. Brown*, 253.
6. STATUTE OF LIMITATIONS. The statute of limitations commenced to run against the corporation only from the time it had knowl-

edge of the agreement and acquisition of the bonds. *Bent v. Priest*, 475.

7. QUESTION OF LAW: JURY: PRACTICE. Whether an instrument purporting to be an acknowledgment of a debt is sufficient to take it out of the bar of the statute of limitations is a question for the court, and whether the debt sued for is the one acknowledged is a question for the jury. *Nastin v. Branham*, 643.
8. STATUTE OF LIMITATIONS: ACKNOWLEDGMENT OF DEBT, SUFFICIENCY OF. The acknowledgment to remove the bar of the statute of limitations (R. S., sec. 3248) must be in writing and signed by the party making it, and must be a direct and an unqualified admission of a subsisting debt which the signer is liable for and is willing to pay. *Ib.*
9. ———: ———. An acknowledgment will be sufficient although contained in an application made by a debtor to an insurance company for a policy on his life, when made at the request of the creditor and for his benefit. *Ib.*
10. ———: ———. The acknowledgment may be made before the debt is barred, and when so made the statute of limitations will begin to run from the time of the acknowledgment. *Ib.*

ADMINISTRATION: NOTICE OF EXHIBITION OF DEMAND: LIMITATION.
Wernse v. McPike, 565.

MACHINERY.

See MASTER AND SERVANT.

MALICIOUS PROSECUTION.

MALICIOUS PROSECUTION: DAMAGES. In an action for malicious prosecution, founded on a prosecution without probable cause of two of five counts of an information, the plaintiff, in order to recover actual damages, is not required to distinguish by his evidence the damages arising from the prosecution of the two counts sued on from those incident to the other counts. The defendant cannot, by uniting in the information groundless accusations with those for which probable cause might exist, escape liability because of the plaintiff's inability to adjust the damages between the two. *Boogher v. Bryant*, 42.

MANDAMUS.

1. MANDAMUS. Mandamus is an appropriate remedy to compel the restoration of a highway, by a railway, to its proper condition, and, in this respect, to require the company to perform its charter duties. *The State ex rel. Morris v. The Hannibal & St. Railway Company*, 13.

2. ——— : RELATORS : PRIVATE CITIZENS. It is sufficient for the relators in such proceeding to show that they are citizens and thus interested in the performance of a public duty. *Ib.*
3. RAILROAD : HIGHWAY, OBSTRUCTION OF. In a mandamus proceeding to compel a railway company to so construct its road as not to prevent the public from using a specified part of a highway, it is no defence that the track had formerly been placed in the highway by another railway company. Such fact is no justification of the continuance of the obstruction of the highway by defendant to the entire exclusion of the public. *Ib.*
4. MUNICIPAL CORPORATION : MANDAMUS. Mandamus cannot issue against a municipal corporation until the claim on which it is based is first reduced into judgment ; and this is necessarily so, where the mandamus proceedings are wholly based on Revised Statutes, section 2415, requiring that an execution against a city, etc., be first returned unsatisfied before mandamus can issue. *Cloud v. Inhabitants of Pierce City*, 357.
5. ——— : MANDAMUS. Where the circuit court has jurisdiction, such jurisdiction cannot be questioned or controlled by mandamus, however erroneously it may be exercised. *The State ex rel. Phelan v. Engelmann*, 551.

MANSLAUGHTER.

See CRIMINAL LAW, 23.

MASTER AND SERVANT.

1. MASTER AND SERVANT : MACHINERY : PRACTICE. In an action for an injury to a servant resulting from the negligence of the master in furnishing him with defectively constructed machinery to use in his work, the servant cannot recover on the ground that the master failed to keep his machinery in repair. *Current v. The Missouri Pacific Railway Co.*, 62.
2. ——— : PLEADING. A petition founded on the negligence of the master in failing to keep the machinery used by his servants in repair, must allege that the master knew its condition, or, by the exercise of due care, might have known it. *Ib.*
3. ——— : MACHINERY : HIDDEN DEFECTS. An employer is not liable for an injury to the servant occasioned by a hidden defect in machinery furnished for his use, unless the employer knew, or, by the exercise of reasonable care, could have discovered such defect. *Ib.*
4. VICE-PRINCIPAL. Where the master appoints an agent with a superintending control over his work, and with power to employ and discharge hands, and to direct and control their movements in and about their work, such agent is a vice-principal and his negli-

gence is that of the master. *Stephens v. The Hannibal & St. Joseph Railway Co.*, 221.

5. MASTER AND SERVANT : ORDER OF MASTER INVOLVING EXTRA HAZARD TO SERVANT. Where the master gives an order to a servant to do an act at a time, or under circumstances which render the doing of the act, extra hazardous, and the servant in obeying the order receives an injury, the master is liable, unless to obey the order was plainly to imperil life or limb. *Ib.*
6. ——— : RISKS ASSUMED BY SERVANT : NEGLIGENCE. A servant assumes the ordinary and natural risks incident to the service in which he engages, and the master is not liable for the servant's want of care. *Renfro v. The Chicago, Rock Island & Pacific Railway Co.*, 302.
7. THE EVIDENCE in this case examined, and the accident, which resulted in the death of plaintiff's husband, who was in defendant's service, held to have been attributable to the risks incident to the business in which the deceased was engaged, coupled with the want of care on the part of himself and a fellow servant. *Ib.*
8. MASTER AND SERVANT : MACHINERY : NEGLIGENCE. It is the duty of an employer to use reasonable and ordinary care and foresight in procuring appliances for the use of his servants, and in keeping the same in repair. But he is not required to furnish absolutely safe machinery, and what is reasonable and ordinary care depends upon the nature and character of the implement, and the dangers to be encountered in its use. *Covey v. The Hannibal & St. Joseph Railway Co.*, 635.
9. ——— : ——— : DAMAGES. The right of the servant to recover damages for injuries incurred in the use of defective machinery, depends upon proof that the injuries were so incurred, and that the master was aware of the defect, or that the use of reasonable care on his part would have disclosed the defect. *Ib.*
10. ——— : AGENT, KNOWLEDGE OF. Knowledge of defects on the part of the agents of the employer, who are intrusted with the duty of procuring machinery and keeping the same in repair, is to be attributed to the employer. *Ib.*
11. ——— : DUTY OF SERVANT : LATENT DEFECTS. While the servant is not bound to search for latent defects, he must take notice of those which are open to his observation, and of which he has knowledge, and if, with such information, he continues to use the implement, he does so at his own risk, as to injuries arising from such known defects. *Ib.*
12. MASTER AND SERVANT : VICE-PRINCIPAL. It is error to single out a servant upon whom none of the duties of the master, as to furnishing proper appliances, and keeping the same in repair, devolve, and predicate a right to recover upon such servant's knowledge of defects, or his want of care. *Ib.*

MECHANIC'S LIEN.

1. PRACTICE : PARTIES : ENFORCEMENT OF MECHANIC'S LIEN. Where, in a proceeding to enforce a mechanic's lien, the trustee and beneficiary in a prior deed of trust are not made parties, the judgment will have no force or effect as to the beneficiary in, or purchaser under, the deed of trust, and the purchaser, at a sale upon the mechanic's lien, will only acquire the equity of redemption, and the right to the premises after the trust lien has been paid. *Coe v. Ritter*, 277.
2. MECHANIC'S LIEN : ACCOUNT OF DEMAND : EVIDENCE. In a proceeding to enforce a mechanic's lien, the lienor must stand or fall by the account which he files, and the dates and items which he specifies, and cannot defeat or postpone a prior lienor or incumbrancer by matter *in pais*. *Ib.*

MINORS.

1. STATUTE OF LIMITATIONS : DISABILITY OF MINORITY : DISAFFIRMANCE OF DEED BY HEIRS. Where a married woman, who is a minor, with the concurrence of her husband, conveys land which descended to her from her ancestor, and dies before attaining her majority, leaving as her sole heir the plaintiff, also a minor, the latter is vested with the right to disaffirm such conveyance, and has the statutory period of three years after attaining her majority, within which to do so, and the institution of an action within such time for the recovery of said land, is a valid disaffirmance of the conveyance. *Harris v. Ross*, 89.
2. ——— : ——— : ———. The conveyance of the grantor and her husband was effectual to pass the title during their joint lives, or during his life, if a tenant by curtesy, and the wife not having survived the particular estate, no cause of action ever accrued to her, and the statute of limitations never commenced to run in her favor; the heir, therefore, was the first person entitled to sue, and against whom the statute first began to run, and, being an infant, she had the full statutory period within which to disaffirm the deed and commence her action. *Ib.*

MINORITY.

See MINORS.

MISDEMEANOR.

MISDEMEANOR : OFFENCE, WHAT NECESSARY TO CONSTITUTE. There can be no offence or misdemeanor, except as the result of the violation of some duty plainly imposed by a competent law-making power. *The City of Kansas v. Corrigan*, 67.

MORTGAGES AND DEEDS OF TRUST.

MORTGAGE : AFTER-ACQUIRED PROPERTY : LEGAL TITLE : EQUITY. A

mortgage of chattels not *in esse*, or not owned by the mortgageor at the execution of the mortgage, will not pass the legal title to such after-acquired property, and the mortgagee, to render his lien effectual, must assert it in a court equity. *France v. Thomas*, 80.

MUNICIPAL CORPORATIONS.

1. CITY OF KANSAS: STREET RAILWAYS: ORDINANCE. Section one of the ordinance of June 29, 1880, of the City of Kansas, relating to street railways, does not require such railways, or any officer thereof, to pave the street on which their cars are operated. *The City of Kansas v. Corrigan*, 67.
2. ORDINANCE: STREET RAILWAY COMPANY: CONTRACT. Where an ordinance of a city, which grants to a horse railway company the privilege of using its streets, requires such railway to keep portions of the street, on which it operates, in good repair, the city cannot, by a subsequent ordinance, compel the company to pave such portions of its street with specified materials, or punish any one concerned for operating the cars of the company, where the paving was not done. Such later ordinance would be an interference with the contract between the city and the railway as contained in the ordinance granting the latter its franchise. *Ib.*
3. MUNICIPAL CORPORATION, CHIEF OFFICER OF: STATUTE. The chairman of the board of trustees of a town, incorporated under the General Statutes of 1865, chapter 41, page 239, is the chief officer of such town. *Cloud v. Inhabitants of Pierce City*, 357.
4. ———: SERVICE OF PROCESS: JUDGMENT BY DEFAULT. In order to support a judgment by default against a corporation, it must appear of record that the person, who the return of the officer shows, was served with process, has such a relation to the corporation that service on such person was tantamount to service on the corporation. *Ib.*
5. ———: ———. There are no statutory provisions in this state regulating the service of process upon cities or towns, and in the absence of such provisions, the manner of service still remains as at common law, and must be upon the mayor or other chief officer. *Ib.*
6. MUNICIPAL CORPORATION: MANDAMUS. Mandamus cannot issue against a municipal corporation until the claim on which it is based is first reduced into judgment; and this is necessarily so, where the mandamus proceedings are wholly based on Revised Statutes, section 2415, requiring that an execution against a city, etc., be first returned unsatisfied before mandamus can issue. *Ib.*
7. ST. LOUIS CITY: PUBLIC STREETS: WELLS. The city of St. Louis has the right to abolish wells situated within the limits of its public streets. *Ferrenbach v. Turner*, 416.
8. ———: WELLS: LICENSE, REVOCATION OF. The passage of an ordinance by the city, directing its street commissioner to fill up said

wells, operates as a revocation of any license, express or implied, to construct the wells in the streets. *Ib.*

9. ——— : ———. The city can abolish said wells at the public expense, and the persons who construct them are not entitled to compensation for their loss. *Ib.*
10. STREET IMPROVEMENTS : TAX-BILLS, AMENDMENT OF. It was competent for the city engineer of the city of St. Joseph, after making out tax bills for macadamizing, curbing and guttering two streets, on discovering that the block had been subdivided into lots, to correct and certify anew the bills, and he could so do, whether he was out of office or was holding the same as his own successor. *Morley v. Weakley*, 451.
11. ——— : ——— : PLEADING. Although the petition stated that each lot was charged for the work done in front of it, and that the engineer computed the cost of the work done "in front of and adjoining the lot," and not for the proportionate share of the cost of the whole work, yet, as in this connection, the cost is alleged to have been that which is chargeable to the whole lot, and that the amount assessed was the proportionate cost of the work under the act authorizing it, and which act is sufficiently referred to, the petition is sufficient. *Ib.*
12. ORDINANCES : MAYOR : CONTRACT. The city ordinances did not require the mayor to act separately in awarding the contract, but that he should act in conjunction with the city council, as its presiding officer. *Ib.*
13. STREET IMPROVEMENT : BIDS, ADVERTISEMENT FOR. It was not necessary that the advertisements for bids should state the amount of work to be done where they showed the streets between which and on which the work was to be done and stated the different classes of work. *Ib.*
14. ——— : SPECIFICATIONS : ORDINANCES. The ordinances, with respect to macadamizing, curbing and guttering, provide in detail as to the material and manner of doing this class of work, and the general ordinance, requiring a plan or profile of the work with specifications to be on file where bids are advertised for any public improvement, has no application. The latter ordinance should not be construed to require the city engineer to do that by specifications which is clearly stated in the ordinance. *Ib.*
15. ——— : LOST BID : EVIDENCE. Where a bid for macadamizing, etc., a street is lost, the loss being shown, parol evidence of its contents is admissible, and the fact that no record or an imperfect account of the bid was kept, will not prevent plaintiff from showing its true contents. *Ib.*

MURDER.

1. MURDER : INSTRUCTIONS. An instruction for murder in the second degree is properly refused where the evidence shows the offence to

be murder in the first degree, or nothing. *The State v. Collins*, 245.

2. CRIMINAL PRACTICE : MURDER : INSTRUCTION. On a trial for murder, an instruction is not erroneous which tells the jury that if they believe the defendants guilty of murder in the first or second degrees, but have a doubt as to which degree, they will give them the benefit of such doubt, and convict of the lesser degree. *The State v. Anderson*, 309.
3. CRIMINAL LAW : EVIDENCE. On the trial of one for murder, it is not competent for him to show by his statement, made at the time he purchased the pistol with which he killed the deceased, that his purpose in buying it was to kill mad dogs. *The State v. Holcomb*, 371.
4. ——— : ——— : MURDER. Although an attempted arrest by an officer is illegal, yet if he is killed in such attempt with express malice, the slayer will be guilty of murder in the first or second degree, and not manslaughter. *Ib.*
5. CRIMINAL LAW : MURDER : PRACTICE : INSTRUCTIONS. On a trial for murder, the court should not instruct for a grade of homicide not shown by the evidence. *The State v. Wilson*, 520.

NEGLIGENCE.

1. ——— : PLEADING. A petition founded on the negligence of the master in failing to keep the machinery used by his servants in repair must allege that the master knew its condition, or, by the exercise of due care, might have known it. *Current v. The Missouri Pacific Railway Company*, 62.
2. ——— : MACHINERY : HIDDEN DEFECTS. An employer is not liable for an injury to the servant occasioned by a hidden defect in machinery furnished for his use, unless the employer knew, or, by the exercise of reasonable care, could have discovered such defect. *Ib.*
3. NEGLIGENCE. Where, in an action founded on the negligence of defendant, plaintiff's evidence shows that his own negligence directly contributed to produce the injury, he disproves the case alleged, and cannot recover. *Milburn v. The Kansas City, St. Joseph & Council Bluffs Railroad Company*, 104.
4. RAILROAD : KILLING STOCK : PUBLIC CROSSING. In an action against a railroad for the negligent killing of plaintiff's cows by its trains, on a public crossing mere proof that the speed of the trains was not checked, and that the cattle could have been seen eighty rods off, does not establish defendant's negligence. *Ib.*
5. ——— : ——— : NEGLIGENCE OF OWNER. Where the owner of cattle sees them in danger on a railroad track, and can, by reasonable exertion get them off, he is bound to do so, and if he does not, and they are injured by a passing train, he cannot recover. The owner,

in such case, has no right to rely upon the performance of the duty which the law imposes on the company of giving warning signals. *Ib.*

6. NEGLIGENCE : CARELESS DRIVING. WHEN OWNER OF CARRIAGE NOT RESPONSIBLE. One who gets into the carriage of another without his consent or knowledge, and is injured by the careless driving of the latter, while so ignorant of his presence in the carriage, cannot recover for the injury. *Siegrist v. Arnot*, 200.
7. ——— : PERSON IN DANGER. Where a person is placed in peril by the carelessness of another who owes him a duty of safely carrying him, the propriety of an attempt to escape a reasonably apprehended danger, is not to be determined by what a person of ordinary care and prudence would have done under the circumstances. *Ib.*
8. NEGLIGENCE : RAILROAD : SPEED OF TRAINS. A railroad has the right to run its trains in excess of the usual rate of speed to make up lost time, but, in doing so, those in charge of the train should use greater vigilance and care to prevent accidents to workmen on the track. *Stephens v. The Hannibal & St. Joseph Railway Company*, 221.
9. ——— : ——— : ———. Where an employe on the track is injured by a train so running at an unusual rate of speed, he cannot recover in the absence of evidence to show that the engineer did discover, or, by the exercise of care, could have discovered the plaintiff in time to have checked the train. *Ib.*
10. BANK DIRECTORS, NEGLIGENCE OF. The negligence of the directors of a bank, whereby they failed to discover the defalcation of the book-keeper, constitutes no defence to an action on the latter's bond. *Chew v. Ellingwood*, 260.
11. MASTER AND SERVANT : RISKS ASSUMED BY SERVANT : NEGLIGENCE. A servant assumes the ordinary and natural risks incident to the service in which he engages, and the master is not liable for the servant's want of care. *Renfro v. The Chicago, Rock Island & Pacific Railway Co.*, 302.
12. THE EVIDENCE in this case examined, and the accident, which resulted in the death of plaintiff's husband, who was in defendant's service, held to have been attributable to the risks incident to the business in which the deceased was engaged, coupled with the want of care on the part of himself and a fellow servant. *Ib.*
13. PARTNERSHIP : NEGLIGENCE, LIABILITY FOR. The defendants were sued as general partners, under the firm name and style of "The Hannibal Meat Company, Limited," for injuries resulting from the explosion of their steam boiler, while used by their employes. It was pleaded as a defence that the company was a joint stock company, organized under the laws of the state of Pennsylvania, and that, under said laws, the company, and not the defendants, as individuals, was liable to be sued for the injuries complained of. It

appeared, on the trial, that there had been a failure, on the part of defendants and their associates, to file their articles of association in the proper recorder's office, in the state of Pennsylvania, as required by the statute of said state, until after the occurrence of the injury sued for. *Held*, that the defendants were rightly sued as general partners. *Smith v. Warden*, 382.

14. RAILROAD : PASSENGER ALIGHTING FROM TRAIN : NEGLIGENCE. In an action against a railroad company by a passenger for injuries received in alighting from a train at the company's station, if the train did not stop a sufficient length of time to enable the plaintiff, by the use of reasonable expedition, to get off before it was again started, and it was so started while plaintiff was in the act of alighting, whereby he was thrown down and injured, the company is liable for the injury. Affirming *Straus v. Kansas City, St. Joseph & Council Bluffs Railway Co.*, 75 Mo. 185. *Straus v. The Kansas City, St. Joseph & Council Bluffs Railway Co.*, 421.
15. — : — : —. If the train was stopped a sufficient length of time for plaintiff to conveniently alight, and without any fault of defendant's servants, he failed to do so, and the conductor not knowing and not having reason to suspect that the plaintiff was in the act of alighting, caused the train to start while he was so alighting, the defendant would not be liable. *Ib.*
16. — : — : —. If a conductor has reason to believe that any passenger who has reached his destination, though dilatory, may be in the act of alighting, and he starts his train without examination, or inquiry, and such passenger is in the act of alighting when the train is started, and is thereby injured, the company will be liable. *Ib.*
17. — : ACTION FOR DEATH OF PERSON : CONTRIBUTORY NEGLIGENCE. One who recklessly or carelessly goes upon the track of a railroad company, without looking or listening for an approaching train, and is thereby killed, when, by looking or listening, he would have been apprised of the approach of the train, is guilty of such contributory negligence as to preclude a recovery in an action for his death, notwithstanding the train was, at the time, running at a rate of speed forbidden by an ordinance of the city in which the accident occurred, and also failed to ring its bell. *Taylor v. The Missouri Pacific Railway Co.*, 457.
18. CONTRIBUTORY NEGLIGENCE : DEMURRER TO EVIDENCE. The evidence of the plaintiff in this case, which was an action for injuries received from defendant's train, in attempting to cross a street in the city of St. Louis, *held*, not to warrant a demurrer to the evidence for defendant, on the ground that it showed that plaintiff had failed to look or listen before attempting to cross the track. *Drain v. The St. Louis, Iron Mountain & Southern Railway Company*, 574.
19. — : —. Where the evidence of plaintiff, relied on to show that he was guilty of contributory negligence, is vague, ambiguous and uncertain and does not clearly, or conclusively show such

negligence on his part, the case should not be taken from the jury. *Ib.*

20. CONTRIBUTORY NEGLIGENCE, NEGLIGENCE OF DEFENDANT AFTER DISCOVERY OF. Although one who is struck and killed by a train while standing on a railroad track is guilty of contributory negligence in so being in a place of peril and danger, yet the railroad will still be liable for the accident if its engineer discovered the danger of the deceased, and after such discovery, by the use of any means within his power consistent with the safety of the train, could have avoided the injury. *Bell v. The Hannibal & St. Joseph Railway Company*, 599.
21. PROXIMATE CAUSE. The failure of the engineer in such case to use the means possessed at the time and adequate to prevent the injury is the proximate cause of the accident. *Ib.*
22. THE PLEADINGS IN THIS CASE held to raise the question of the railroad's negligence after becoming aware of the danger of the deceased, and also, held that the evidence presented a proper question for the jury thereon. *Ib.*

On re-hearing.

23. UPON A REVIEW AND RECONSIDERATION of the whole case, held that the death of the deceased was occasioned directly and solely by his own gross carelessness in going and remaining upon the railroad track, without looking or listening for the approach of the train, and that there is no evidence in the record that the servants of defendant in charge of the engine and train could have avoided the injury after discovering the danger of the deceased, or that upon the discovery of his presence and peril upon the track they failed or omitted to use any means within their power to avoid and prevent the accident, and that, therefore, the demurrer to the evidence should have been sustained (Ray, J., dissenting). *Ib.*
24. MASTER AND SERVANT : MACHINERY : NEGLIGENCE. It is the duty of an employer to use reasonable and ordinary care and foresight in procuring appliances for the use of his servants, and in keeping the same in repair. But he is not required to furnish absolutely safe machinery, and what is reasonable and ordinary care depends upon the nature and character of the implement, and the danger to be encountered in its use. *Covey v. The Hannibal & St. Joseph Railway Company*, 635.
25. ——— : ——— : DAMAGES. The right of the servant to recover damages for injuries incurred in the use of defective machinery, depends upon proof that the injuries were so incurred, and that the master was aware of the defect, or that the use of reasonable care on his part would have disclosed the defect. *Ib.*
26. ——— : AGENT, KNOWLEDGE OF. Knowledge of defects on the part of the agents of the employer, who are intrusted with the duty of procuring machinery and keeping the same in repair, is to be attributed to the employer. *Ib.*

- 27 ——— : DUTY OF SERVANT : LATENT DEFECTS. While the servant is not bound to search for latent defects, he must take notice of those which are open to his observation, and of which he has knowledge, and if, with such information, he continues to use the implement, he does so at his own risk, as to injuries arising from such known defects. *Ib.*
28. ——— : VICE PRINCIPAL. It is error to single out a servant upon whom none of the duties of the master, as to furnishing proper appliances and keeping the same in repair, devolve, and predicate a right to recover upon such servant's knowledge of defects, or his want of care. *Ib.*

NEW TRIAL.

1. PRACTICE : NEW TRIALS. There is no limit to the number of new trials the trial court may grant either party, where they are allowed on account of errors committed in giving or refusing instructions, or in admitting or excluding evidence. *The State ex rel. Albers et al. v. Horner*, 71.
2. ——— : ———. Nor is there any limit to the number of new trials which may be granted when the jury err in a matter of law, or where they are guilty of misbehavior. R. S., sec. 3705. *Ib.*
3. ——— : REMARKS OF COUNSEL : NEW TRIAL. It is no ground for new trial that counsel in argument to the jury misrepresented the facts in evidence. It is for the jury, in such case, to apply the correction. *The State v. Zumbunson*, 111.

NOTICE.

1. TITLE TO LAND : UNRECORDED TITLE BOND : NOTICE. A purchaser of land for value, without notice of an unrecorded title bond, will take a clear title against any right growing out of such bond. *Anderson v. McPike*, 293.
2. EQUITY : PURCHASER WITH NOTICE UNDER PURCHASER WITHOUT NOTICE. A purchaser with notice, from a *bona fide* purchaser for a valuable consideration without notice, is entitled to the same protection in equity against one seeking to overturn his title as the purchaser without notice. *Ib.*
3. ——— : ——— : NOTICE. A railroad is not liable for an injury resulting from its crossing being out of repair, unless it had notice of such fact, or the defect existed a sufficient length of time to justify the presumption of notice. *Mann v. The Chicago, Rock Island & Pacific Railway Company*, 347.
4. PROCESS, CONSTRUCTIVE SERVICE OF : NOTICE. The doctrine of constructive service of process or notice is altogether the creature of statutory enactment, and has no existence, except where expressly declared by the law-making power. *Cloud v. Inhabitants of Pierce City*, 357.

5. NOTICE. One who claims title through a deed which recites that the land is subject to an encumbrance, will be held to have been put on inquiry as to the nature and amount of such encumbrance when he purchased. *Bronson v. Wanzer*, 408.
6. VENDOR'S LIEN. One who buys land subject to a vendor's lien, with notice of the same, takes it subject to such lien. *Ib.*

See SHERIFF'S DEED, 1.

NUISANCE.

1. PUBLIC NUISANCE : BAWDY HOUSE. A bawdy house is a public or common nuisance *per se*, but this is not the case when such house is authorized by law, and kept in accordance with its provisions. *Givens v. Van Studdiford*, 149.
2. ——— : ———. Where, in violation of the municipal ordinance regulating such house, the inmates so indecently expose or conduct themselves as to render the property of an adjoining proprietor undesirable, or unfit for use and occupancy by decent persons, it becomes a common nuisance. *Ib.*
3. LEASING PROPERTY FOR A BAWDY HOUSE : INJURY TO ADJOINING OWNER. To render the landlord responsible, in such case, to the adjoining owner for the depreciation in value of the latter's property, resulting from such alleged nuisance, it must appear that he leased the property for the purpose of, or knowing it would be used for a bawdy house, and that he assented to the indecent conduct of the inmates, or continued the leasing after knowledge of the fact. *Ib.*
4. PUBLIC NUISANCE, PRIVATE ACTION FOR. While, as a general rule, it is true that the law does not give a private action for a public wrong, an exception to this exists where a private person suffers some damage over and beyond the rest of the community by reason of a public nuisance. *Ib.*
5. ——— : SPECIAL DAMAGE. In a private action for injury resulting from a public nuisance, the special damage suffered by the plaintiff must be averred and proved. *Ib.*
6. MEASURE OF DAMAGES. The loss of rents is a proper element of damages in an action against the lessor of a bawdy house by the owner of adjoining property for injury resulting to the latter from the nuisance. *Ib.*
7. ———. The depreciation in the value of the property, it having been sold at a forced sale during the continuance of the nuisance, is also a proper element of damages. *Ib.*

OFFICES AND OFFICERS.

1. ATTACHMENT: INTERPLEA: APPEAL: SUPERSEDEAS: EXECUTION, WHEN OFFICER NOT LIABLE FOR FAILURE TO LEVY. The pendency of the appeal of an interpleader from the judgment of a justice of the peace in an action of attachment, where bond is given by the interpleader, operates as a *supersedeas* in the cause, and prevents the sale of the attached property pending such appeal, and an officer is not liable in such case for failure to levy an execution issued against the property interpleaded. *The State ex rel. Boyington v. Ranson*, 327.
2. MUNICIPAL CORPORATION, CHIEF OFFICER OF: STATUTE. The chairman of the board of trustees of a town, incorporated under the General Statutes of 1865, chapter 41, page 239, is the chief officer of such town. *Cloud v. Inhabitants of Pierce City*, 357.
3. POLICEMAN: PROOF OF OFFICIAL CHARACTER. It is only necessary, in order to show that one was a policeman, in a city of the fourth class, to prove that he acted and was recognized as such officer. It is unnecessary to produce his official appointment as policeman. *The State v. Holcomb*, 371.
4. CITIES OF FOURTH CLASS: POLICEMAN: RIGHT TO MAKE ARRESTS. A policeman in cities of the fourth class, in the absence of an ordinance giving him the authority, has no right, without a warrant, to arrest a person for carrying concealed weapons. *Ib.*
5. ———: ———: MURDER. Although the attempted arrest by the officer in such case was illegal, yet if the defendant killed the deceased with express malice, it constituted murder in the first or second degree, and not manslaughter. *Ib.*

OPINION.

See WARRANTY.

ORDINANCE.

CITY ORDINANCE, WHEN MUST BE PLEADED. Where one asserts his right to recover upon a city ordinance, or seeks to justify an act done by him under such ordinance, he should plead it. *Givens v. Van Studdiford*, 149.

See MUNICIPAL CORPORATIONS.

PARTIES.

1. PARTIES. Under our statute, making all contracts joint and several, a separate action may be brought against one of several heirs to charge him on the bond of his ancestor where such heir holds his portion of the estate in severalty. *The State ex rel. Yeoman v. Hoshaw*, 193.

2. ——— : SUBSTITUTION OF : STATUTE. One who acquires the title of a purchaser at a sale under a deed of trust, may, under the statute (R. S., sec. 3671), be substituted as party-plaintiff, after the institution of an ejectment suit by such purchaser. *Coe v. Ritter*, 277.
3. PRACTICE : PARTIES : CONSIGNEE, RIGHT OF ACTION OF : RAILROAD : DAMAGES. The consignees of a car load of wheat screenings shipped over a company's railroad, but which was destroyed before reaching its destination, may maintain an action against the railroad company for the recovery of damages for such destruction. *Kirkpatrick v. The Kansas City, St. Joseph & Council Bluffs Railway Co.*, 341.
4. ——— : ——— : ——— : ———. Where the consignee of goods shipped upon a railroad pays the draft drawn on him by the shipper and receives the bill of lading to which the draft is attached, and subsequently purchases the goods from the owner, he thereby becomes the real party in interest under the code. R. S., sec. 3462. And it makes no difference that the goods were destroyed before the absolute sale, as the property of the owner in them still continued and was the subject of transfer, and the transferee could maintain action for damages for their destruction on the ground of such transfer. *Ib.*

See PRACTICE, CIVIL, 15.

PARTNERSHIP.

1. PARTNERSHIP : NEGLIGENCE, LIABILITY FOR. The defendants were sued as general partners, under the firm name and style of "The Hannibal Meat Company, Limited," for injuries resulting from the explosion of their steam boiler, while used by their employees. It was pleaded as a defence that the company was a joint stock company, organized under the laws of the state of Pennsylvania, and that, under said laws, the company, and not the defendants, as individuals, was liable to be sued for the injuries complained of. It appeared, on the trial, that there had been a failure, on the part of defendants, and their associates, to file their articles of association in the proper recorder's office, in the state of Pennsylvania, as required by the statute of said state, until after the occurrence of the injury sued for. *Held*, that the defendants were rightly sued as general partners. *Smith v. Warden*, 382.
2. LIMITED PARTNERSHIP. A full compliance with the laws of Pennsylvania, both as to the statements required to be made in the articles of association, and as to recording the same, was necessary and pre-requisite to the formation of the limited partnership in that state, and if the partners proceeded to do business before so complying with the law, they did so as general partners. *Ib.*
3. PARTNERSHIP : RECEIVER, POWER OF COURT TO APPOINT : JURISDICTION. The circuit court has original jurisdiction in all matters of equity, and has inherent power, independent of any statute authorizing it, to appoint a receiver in the settlement of partnership affairs, where there is no statute depriving it of such power. *Cox v. Volkert*, 505.

PERSONAL PROPERTY.

1. **PERSONAL PROPERTY: GIFT.** Delivery of possession, either actual or constructive, is essential to a gift of corporeal personal property. *Doering v. Kenamore*, 588.
2. ———: ———. Where such property is in the adverse possession of another, there can be no delivery, and, hence, no gift. *Ib.*

PERSONAL SERVICE.

1. **PERSONAL SERVICE, CONTRACT FOR.** When one enters into a contract of service for another for a fixed salary, or compensation, he, *prima facie*, agrees to give the latter his entire time, and the rendition of service by the employe, as a notary public in the employer's business, does not make the latter liable for the statutory fees therefor, in the absence of an agreement or understanding to that effect, or a course of conduct between the parties showing such fees were not to be included in the employe's salary. *Leach v. The Hannibal & Joseph Railroad Co.*, 27.
2. **QUESTION FOR THE JURY.** Whether such fees were included in the employe's salary is a question of fact for the jury to determine from the evidence, under proper instructions. *Ib.*
3. **EVIDENCE.** Receipts given by the employe to the employer, stating that the sums therein mentioned were in full for all demands for work done during regular and irregular hours, in the employer's service, are admissible in evidence in an action for such fees, and are *prima facie* evidence of payment as therein expressed, and such receipts are also competent evidence to show the capacity in which the employe acted, and the relation he sustained to the employer. *Ib.*
4. ———. It was also competent for defendant, on the trial of such cause, to show that the services of plaintiff, as notary, were performed during regular business hours, while he was in defendant's service. *Ib.*

PLEADING.

1. ———: **PLEADING.** A petition founded on the negligence of the master in failing to keep the machinery used by his servants in repair must allege that the master knew its condition, or, by the exercise of due care, might have known it. *Gurrent v. The Missouri Pacific Railway Company*, 62.
2. **CODE: PLEADING UNDER.** Under the code there is but one form for a civil action, and the petition need only set out the facts constituting the cause of action, and this is the case whether such facts authorize legal or equitable relief. *Clark v. Clark*, 114.
3. **CITY ORDINANCE, WHEN MUST BE PLEADED.** Where one asserts

his right to recover upon a city ordinance, or seeks to justify an act done by him under such ordinance, he should plead it. *Givens v. Van Studdiford*, 149.

4. PLEADING : SPECIAL PLEA. The defence that the services sued for were contrary to public policy, should be pleaded. *Musser v. Adler*, 445.
5. ——— : GENERAL DENIAL : SPECIAL PLEA. A general denial puts in issue the facts alleged in the petition, and not the liability arising therefrom. The facts, from which the law draws the conclusion of defendant's non-liability, must be specially pleaded in the answer when they are not stated in the petition. *Ib.*
6. ——— : ——— : PLEADING. Although a petition stated that each lot was charged for the work done in front of it, and that the engineer computed the cost of the work done "in front of and adjoining the lot," and not for the proportionate share of the cost of the whole work, yet, as in this connection, the cost is alleged to have been that which is chargeable to the whole lot, and that the amount assessed was the proportionate cost of the work under the act authorizing it, and which act is sufficiently referred to, the petition is sufficient. *Morley v. Weakley*, 451.
7. CODE PLEADING : DIFFERENT CAUSES OF ACTION, JOINDER OF. Under the code, each cause of action must be separately stated with the relief sought, yet the same cause of action may be stated in different ways in different counts. *The St. Louis Gas Light Company v. The City of St. Louis*, 495.
8. ———. Where allegations are once clearly made which are common to all the counts, it is sufficient as to such allegations to make reference to them in the subsequent counts. *Ib.*
9. PLEADING, EFFECT OF. The fact that defendant may plead the legal effect of an instrument differently from the plaintiff, does not deny its execution. *Cox v. Volkert*, 505.

PLEADING, CRIMINAL.

1. CRIMINAL LAW : FORGERY IN SECOND DEGREE : INDICTMENT. An indictment for forgery in the second degree, under Revised Statutes, section 1406, examined and approved. *The State v. Yerger*, 33.
2. ——— : ——— : ———. In an indictment for forgery, it is not necessary to expressly allege that the name charged to have been forged was affixed to the forged instrument, when the latter is set forth according to its tenor, and shows such to be the fact. *Ib.*
3. ——— : FORGERY : TENOR : PURPORT. Where the tenor of the forged instrument is exact, and complete, and sufficiently gives the purport, the purporting clause may be rejected as surplusage. *Ib.*
4. FORGERY : INDICTMENT : INTENT. It is not necessary to the validity

of an indictment for forgery that it should charge an intent on the part of the defendant to defraud any particular person. *Ib.*

5. ———: ———: INDICTMENT. It is not necessary in an indictment for forging a check, to set out the indorsement thereon, as that is not charged to be forged, and has nothing to do with the forged instrument. *Ib.*
6. INDICTMENT: FELONIOUS ASSAULT. An indictment under Revised Statutes, section 1263, charging that defendant assaulted another by pointing a gun at the latter with the intent to maim and kill him, is not defective in only alleging that the gun was loaded with gunpowder. Serious injury can be inflicted with a gun so loaded. *The State v. Sears*, 169.
7. CRIMINAL LAW: PLEADING: PRACTICE: EVIDENCE. An indictment for felonious assault, under Revised Statutes, section 1262, and a series of instructions applicable to that offence approved, and the evidence in the case held sufficient to sustain a conviction. *The State v. Jones*, 623.

POLICEMAN.

1. POLICEMAN: PROOF OF OFFICIAL CHARACTER. It is only necessary, in order to show that one was a policeman, in a city of the fourth class, to prove that he acted and was recognized as such officer. It is unnecessary to produce his official appointment as policeman. *The State v. Holcomb*, 371.
2. CITIES OF FOURTH CLASS: POLICEMAN: RIGHT TO MAKE ARRESTS. A policeman in cities of the fourth class, in the absence of an ordinance giving him the authority, has no right, without a warrant, to arrest a person for carrying concealed weapons. *Ib.*
3. ———: ———: MURDER. Although the attempted arrest by the officer in such case was illegal, yet if the defendant killed the deceased with express malice, it constituted murder in the first or second degree, and not manslaughter. *Ib.*

POSSESSION.

1. LAND, PURCHASE OF: POSSESSION: VENDOR AND VENDEE. Where the vendor of land, at the time of contracting, refuses to put the vendees in possession, and the conveyance is accepted on such terms, it is not the vendor's duty to put the vendees in possession. *Anderson v. McPike*, 293.
2. LANDLORD AND TENANT: ATTORNMENT: POSSESSION: PURCHASER UNDER TRUST DEED. The purchaser of land at a trustee's sale, made at the request of the administrator of the beneficiary, acquires all the title of the mortgageor and the beneficiaries under the trust deed, and as against them is entitled to the possession; and a tenant, holding under authority of the administrator's lessee, who attorns to the purchaser, becomes the latter's tenant, and thereafter the

- tenant's possession is the possession of the purchaser. *Lindenbower v. Bentley*, 515.
3. TRESPASS: POSSESSION. Possession of real estate is a pre-requisite to an action for trespass, and one who is not in possession cannot maintain the action. *Ib.*
 4. ———: ———: LANDLORD AND TENANT. A tenant to whom land is rented is entitled to its exclusive possession, and being in exclusive possession, the landlord out of possession cannot maintain trespass. *Ib.*
 5. POSSESSION OF TENANT: SECOND LEASE. The possession of a tenant is the possession of his lessor, and the fact that the parties claiming the adverse title without the knowledge of such lessor prevailed on tenant, while so in possession under the first lease, to accept a lease from them, cannot affect the possession of such first lessor. *Farrar v. Heinrich*, 521.
 6. ———: ———. The fact that the second lessors may have made their lease under the mistaken belief that the tenant was a squatter and in ignorance of the existence of the first lease, cannot affect the rights of the first lessor. *Ib.*
 7. ———: ———. If neither party in fact knew, nor had reason to suspect the existence of the lease by the other, and although both acted in good faith in making their respective leases, still such facts cannot help the second lessor. In such circumstances the familiar doctrine and duty of the court is not to interfere, but to leave the parties as it found them. *Ib.*

See LARCENY, 1.

PRACTICE, CIVIL.

1. DEATH OF WIDOW PENDING SUIT: REVIVAL IN NAME OF ADMINISTRATOR: EJECTMENT: DAMAGES. Where the widow dies pending an action of ejectment by her for the recovery of possession of the mansion house and messuages, the suit may be revived in the name of her administrator, and recovery had for rents and profits, by way of damages, to the time of her death. *Roberts v. Nelson*, 21.
2. EJECTMENT: DAMAGES: STATUTE. The statute with respect to ejectment suits, contemplates that damages may be declared for in the same suit, and in the same count. *Ib.*
3. INSTRUCTION. An instruction should not be given where there is no evidence to authorize it. *Brown v. The Covenant Mutual Life Insurance Company*, 51.
4. MASTER AND SERVANT: MACHINERY: PRACTICE. In an action for an injury to a servant, resulting from the negligence of the master in furnishing him with defectively constructed machinery to use in

his work, the servant cannot recover on the ground that the master failed to keep his machinery in repair. *Current v. The Missouri Pacific Railway Company*, 62.

5. PRACTICE: NEW TRIALS. There is no limit to the number of new trials the trial court may grant either party, where they are allowed on account of errors committed in giving or refusing instructions, or in admitting or excluding evidence. *The State ex rel. Albers et al. v. Horner*, 71.
6. ———: ———. Nor is there any limit to the number of new trials which may be granted when the jury err in a matter of law, or where they are guilty of misbehavior. R. S., sec. 3705. *Ib.*
7. JURISDICTION: PROCESS: PRACTICE. Where an original petition states a cause of action against individuals, as constituting a co-partnership, and the amended petition states one against a corporation, the latter, before the court can have jurisdiction to render judgment, must be in court on voluntary appearance, or be brought in by service of process, and this is the case although the firm name was the same as that of the corporation, and the stockholders in the latter composed said firm. *Thompson v. Allen*, 85.
8. NEGLIGENCE. Where, in an action founded on the negligence of defendant, plaintiff's evidence shows that his own negligence directly contributed to produce the injury, he disproves the case alleged, and cannot recover. *Milburn v. The Kansas City, St. Joseph & Council Bluffs Railway Company*, 104.
9. BILL OF EXCEPTIONS: MOTION FOR NEW TRIAL. A bill of exceptions is properly made up at the term of the court at which the motion for a new trial is overruled. And it is immaterial that such motion was overruled at the third term after it was filed without being continued from term to term by any special or general order of court. *Givens v. Van Studdiford*, 149.
10. CITY ORDINANCE, WHEN MUST BE PLEADED. Where one asserts his right to recover upon a city ordinance, or seeks to justify an act done by him under such ordinance, he should plead it. *Ib.*
11. JUDGMENT, REVERSAL OF. Where a judgment is reversed with the usual mandate to restore the parties to the same condition in which they were before its rendition, it becomes mere waste paper, and the parties are allowed to proceed in the trial court to obtain a final determination of their rights in the same manner and to the same extent as if the cause had not been decided in the trial court. Neither party in the subsequent prosecution of the cause can suffer detriment or receive assistance from the former adjudication. *Crispen v. Hannovan*, 160.
12. THE JUDGMENT OF THE CIRCUIT COURT, reversing that of the probate court, for errors committed by the latter court in the admission of evidence, affirmed. *Coombs v. Coombs*, 176.
13. PARTIES. Under our statute, making all contracts joint and

several, a separate action may be brought against one of several heirs to charge him on the bond of his ancestor where such heir holds his portion of the estate in severalty, *The State ex rel. Yeoman v. Hoshaw*, 193.

14. PRACTICE: FINDING OF JURY. Where the instructions properly present the matters in issue to the jury, their verdict must be regarded as final. *Ingle v. Mudd*, 216.
15. ———: PARTIES: ENFORCEMENT OF MECHANIC'S LIEN. Where, in a proceeding to enforce a mechanic's lien, the trustee and beneficiary in a prior deed of trust are not made parties, the judgment will have no force or effect as to the beneficiary in, or purchaser under, the deed of trust, and the purchaser, at a sale upon the mechanic's lien, will only acquire the equity of redemption, and the right to the premises after the trust lien has been paid. *Coe v. Ritter*, 277.
16. ———: PRACTICE: INSTRUCTIONS. In the trial of an action for damages for fraudulent representations touching the financial condition of a person, the jury should not be left to conjecture as to what are material false statements. *Anderson v. McPike*, 293.
17. ———: TRANSCRIPT OF BILL OF EXCEPTIONS. The clerk of the trial court in making a transcript of the bill of exceptions cannot insert instructions not contained in nor called for by such bill. *The State v. Anderson*, 309.
18. ———: PARTIES: CONSIGNEE, RIGHT OF ACTION OF: RAILROAD: DAMAGES. The consignee of a car load of wheat screenings, shipped over a company's railroad, but which was destroyed before reaching its destination, may maintain an action against the railroad company for the recovery of damages for such destruction. *Kirkpatrick v. The Kansas City, St. Joseph & Council Bluffs Railway Co.*, 341.
19. ———: ———: ———: ———. Where the consignee of goods shipped upon a railroad pays the draft drawn on him by the shipper and receives the bill of lading to which the draft is attached, and subsequently purchases the goods from the owner, he thereby becomes the real party in interest under the code. R. S., sec. 3469. And it makes no difference that the goods were destroyed before the absolute sale, as the property of the owner in them still continued and was the subject of transfer, and the transferee could maintain action for damages for their destruction on the ground of such transfer. *Ib.*
20. SEVERAL CAUSES OF ACTION. Injuries caused by the explosion of a boiler, to furniture of the husband, and to his wife's person, are distinct, and afford grounds for different causes of action. *Smith v. Warden*, 382.
21. HUSBAND AND WIFE: PRACTICE: RECEIPT. A receipt, by the husband, acknowledging satisfaction for the injury to the furniture, and for the payment by him of physicians' bills incurred by reason

of the injuries to his wife, and for the expenses of a truss for her, is no bar to an action for the injuries to the wife's person. *Ib.*

22. **EQUITABLE ACTION: PRACTICE: JURY.** A suit to subject land to the enforcement of a vendor's lien being an equitable one is properly triable by the court and a jury cannot be demanded therein as a matter of right. *Bronson v. Wanzer*, 408.
23. ———: ———: ———. The court, however, in such suit, may, in its discretion, take the opinion of the jury upon a specific question of fact by an issue made up for the purpose, but it is not bound by the finding of the jury and may adopt or reject the same as it may deem proper. *Ib.*
24. **PRACTICE: REMARKS OF COUNSEL: DISCRETION OF TRIAL COURT.** It is for the trial court to determine whether counsel in the conduct of a case, and in argument to the jury, transcend the limits of professional duty and propriety. *Straus v. The Kansas City, St. Joseph & Council Bluffs Railway Co.*, 421.
25. ———: ———: **PROVINCE OF JURY.** Where counsel cannot agree as to the evidence in a cause, or mis-state the evidence, in argument, to the jury, it is the peculiar province of the jury, and not of the court, to determine what the evidence was. *Ib.*
26. ———: **EVIDENCE: OPINION OF WITNESS.** It is not reversible error for a non-expert witness, who testifies to the facts in a case, to give an opinion based upon such facts. *Ib.*
27. ———: **INSTRUCTION.** A party cannot complain of an instruction given at his own request. *Musser v. Adler*, 445.
28. **INSTRUCTIONS: COMMENTING ON EVIDENCE.** While an instruction should not comment on the evidence, nor single out one or more facts and give them undue prominence, yet an instruction in an action for the recovery of the value of services rendered as an attorney, is not so objectionable, which tells the jury that in considering the value of the plaintiff's services they should take into consideration the magnitude of the cases in which they were rendered, the skill required to perform the same so far as possessed by plaintiff; the time required in the trial and preparation of the causes, and all the facts and circumstances touching the services so rendered. *Ib.*
29. **CHAMPERTY.** Unless the plaintiff's title, by which he seeks to enforce a right, is infected with a champertous agreement, he may proceed with his suit, and this is the case although such illegal contract may exist between the plaintiff and his attorney. A party will not be turned out of court because of a champertous contract, until he asks the aid of the court to enforce it. *Bent v. Priest*, 475.
30. **PRACTICE: JURISDICTION: APPEAL.** The circuit court does not, by granting an appeal, lose jurisdiction in a cause, and a bill of ex-
VOL. 86—48

ceptions may be filed and acted upon after appeal granted. *Shaw v. Shaw*, 594.

31. ——— : WEIGHT OF EVIDENCE : DEMURRER. It is not the province of the court to determine the weight of the evidence, and where it is conflicting, a demurrer to the evidence, and instructions of a like character, are properly refused. *Covey v. Hannibal & St. Joseph Railway Company*, 635.
32. QUESTION OF LAW : JURY : PRACTICE. Whether an instrument purporting to be an acknowledgment of a debt is sufficient to take it out of the bar of the statute of limitations, is a question for the court, and whether the debt sued for is the one acknowledged, is a question for the jury. *Martin v. Branham*, 643.
33. BANKRUPTCY : ASSIGNEE, POWERS OF : PRACTICE. An assignee in bankruptcy becomes entitled to the property of the bankrupt fraudulently conveyed, concealed, or inadvertently omitted, as well as that scheduled and surrendered; he acquires the title thereto by virtue of the proceedings in bankruptcy, and the deed of assignment, and is the proper party to sue for and recover the same. *Peery v. Carnes*, 652.
34. ——— : ——— : PRACTICE : TRUSTEE. So long as the proceedings in bankruptcy are pending, the assignee is the only proper person to sue, and the creditors are bound to assert their rights as such by and through the assignee, who is a trustee for the creditors and the bankrupt, with power to collect the assets and convert the assigned property into money and distribute it among the creditors. When this is done and the proceedings are brought to an end, his trust ceases, and whatever is left in his hands becomes the property of the bankrupt by operation of law, without any formal discharge of the assignee or re-transfer. *Ib.*
35. ——— : PRACTICE : BANKRUPT. After the assignee's trust has ceased, and the bankrupt has been discharged, the latter is the proper party to sue for demands due himself, at the time he was adjudged a bankrupt. *Ib.*
36. RAILROAD : RECEIVER, ACTION AGAINST : CONTRACT. An action can be brought in a state court against a receiver of a railroad by permission of the United States court which appointed him, for the breach of a contract for the purchase of ties, made by the railroad before the appointment of the receiver. *Harding v. Nettleton*, 658.
37. RECEIVER : JUDGMENT. The judgment of the state court cannot be enforced against the property of the corporation in the hands of the receiver, but must be presented to the United States court for allowance, and the latter court will determine the manner and time of paying it out of the assets of the road. *Ib.*
38. JUSTICE OF PEACE, APPEAL FROM : DISMISSAL OF SUIT. Where, on an appeal from a justice of the peace, the transcript shows that the justice acquired jurisdiction of the defendant, it having filed its

motion to set aside the judgment by default, a motion in the circuit court to dismiss the suit because of service of summons in the wrong township, should not be sustained. *Kelly v. The Chicago, Rock Island & Pacific Railway Company*, 681.

39. ——— : ———. The circuit court should have proceeded under Revised Statutes, section 3052, to try the case *de novo*. *Ib*.
40. ACTIONS EX DELICTO : JURISDICTION. In actions *ex delicto* the damages claimed in the petition determine the jurisdiction of the court, and if the plaintiff recover any damages he shall recover his costs. R. S., sec. 995. *Vineyard v. Lynch*, 634.
41. ——— : ———. The test of jurisdiction in actions *ex delicto* is the aggregate amount of damages prayed for, and not the amount of damages prayed for in a single count. And this is true, whether the action be for a wrong in the nature of a tort or otherwise. *Ib*.
42. ——— : SEVERAL COUNTS : COSTS. In an action *ex delicto*, where the petition contains several counts, if the plaintiff recover any damages upon any count, the costs shall not be adjudged against him. R. S., sec. 995. *Ib*.

See MANDAMUS, 2.

PERSONAL SERVICE, 2.

PRACTICE, CRIMINAL.

1. PRACTICE, CRIMINAL : PRESENCE OF DEFENDANT IN COURT DURING TRIAL. When the record in the appellate court shows that the defendant in a criminal cause was present at the commencement, or any other stage of the trial, it will be presumed, in the absence of evidence in the record to the contrary, that he was present during the whole trial. R. S., sec. 1891. *The State v. Yerger*, 33.
2. PRACTICE : REMARKS OF COUNSEL : NEW TRIAL. It is no ground for new trial that counsel in argument to the jury misrepresented the facts in evidence. It is for the jury, in such case, to apply the correction. *The State v. Zumbunson*, 111.
3. ——— : ———. Neither language of invective, by counsel, when called forth by the character of the crime, which the evidence tends to disclose, nor urgent appeals to the triers of the facts to do their duty, will justify the Supreme Court in reversing a judgment. *Ib*.
4. CRIMINAL PRACTICE : ASSESSMENT OF PUNISHMENT. Where the jury assess the punishment below the legal limit allowed by law for the offence of which they find defendant guilty, it is the duty of the court to sentence the defendant according to the lowest limit prescribed by law in such case. *The State v. Sears*, 169.

5. **INDICTMENT: PROSECUTOR.** Where an indictment is for a felony, the name of the prosecutor is not required to be endorsed thereon, although under the indictment the defendant may be convicted of an offence which is only a misdemeanor. *Ib.*
6. **PRACTICE, CRIMINAL: JURORS, PANEL OF.** The fact that in a trial for murder, a panel of forty qualified jurors was procured on the sixth, when the cause was not to be tried until the tenth, constitutes no error, as the defendant or his counsel could have re-examined them on the tenth, if he had so desired, to ascertain whether any of them had become disqualified between the dates mentioned. *The State v. Collins*, 245.
7. ———: **SEPARATION OF JURY.** The temporary separation of a juror from his fellows, the juror being under the charge of an officer while the others remained locked in their room, and nothing being said to such juror about the trial, constitutes no ground for a reversal of the judgment. *Ib.*
8. ———: **JURORS: OBJECTION TO PANEL AFTER VERDICT.** It is too late after verdict to object to the panel of jurors, or to the manner of its selection. *Ib.*
9. ———: **INSTRUCTIONS.** An instruction for murder in the second degree is properly refused where the evidence shows the offence to be murder in the first degree, or nothing. *Ib.*
10. **CRIMINAL PRACTICE: MURDER: INSTRUCTION.** On a trial for murder, an instruction is not erroneous which tells the jury that if they believe the defendants guilty of murder in the first or second degrees, but have a doubt as to which degree, they will give them the benefit of such doubt, and convict of the lesser degree. *The State v. Anderson*, 309.
11. ———: **INSTRUCTION.** An instruction held not erroneous because it did not confine the belief of the jury to the evidence, they having been sworn to try the case on the evidence, and it appearing they could not possibly have supposed they were permitted by the instruction to base their verdict upon anything but the testimony in the case. *Ib.*
12. ———: **DEFENDANT TESTIFYING.** A defendant who has testified is entitled to have instructions predicated on the facts sworn to by him just as if he were a disinterested witness. *Ib.*
13. ———: **TRANSCRIPT OF BILL OF EXCEPTIONS.** The clerk of the trial court in making a transcript of the bill of exceptions cannot insert instructions not contained in nor called for by such bill. *Ib.*
14. **CRIMINAL PRACTICE: GRAND JUROR, CHALLENGE OF.** The challenge of a grand juror can be made only on the ground that the juror is the prosecutor or complainant, or a witness on the part of the prosecution. R. S., secs., 1772, 1773. *The State v. Holcomb*, 371.

15. ———: CHANGE OF VENUE. The finding of the trial court in a criminal case, on the question of the prejudice of the inhabitants of the county, on the hearing of an application for a change of venue, will not be interfered with by the Supreme Court, unless palpable injustice has been done the defendant. *Ib.*
16. CRIMINAL LAW: MURDER: PRACTICE: INSTRUCTIONS. On a trial for murder, the court should not instruct for a grade of homicide not shown by the evidence. *The State v. Wilson*, 520.
17. ———: PRACTICE: INSTRUCTIONS. In a prosecution for felonious assault, under Revised Statutes, section 1262, where the evidence shows that grade of offence, it is not error to refuse to instruct that the defendant may be awarded a less degree of punishment than imprisonment in the penitentiary. *The State v. Jones*, 623.

PRACTICE IN SUPREME COURT.

1. ———: PRACTICE. Neither language of invective, by counsel, when called forth by the character of the crime, which the evidence tends to disclose, nor urgent appeals to the triers of the facts to do their duty, will justify the Supreme Court in reversing a judgment. *The State v. Zumbunson*, 111.
2. ———: JUDGMENT AGAINST A MARRIED WOMAN. Where a judgment is erroneously rendered against a married woman, the Supreme Court can amend the same by striking out her name. *Crispen v. Hannocan*, 160.
3. ———. Excess in amount of a judgment may be obviated by a *re-mittitur* in the Supreme Court. *Buse v. Russell*, 209.
4. ———. The Supreme Court will only review the record proper in a cause, where it fails to appear that any exceptions were taken to the action of the trial court in overruling the motions for new trial and in arrest of judgment. *The State ex rel. Dopkins v. Hitchcock*, 231.
5. ———: CERTIORARI. A transcript certified to the Supreme Court in return to a writ of *certiorari*, supersedes the one previously filed, and the latter cannot be regarded in determining the cause. *The State v. Anderson*, 309.
6. ———: BILL OF EXCEPTIONS: INSTRUCTIONS. The Supreme Court will not presume that proper instructions were given by the trial court for the defendant, where the bill of exceptions only discloses that instructions were given for the state, and that others were asked for by defendant and refused. *Ib.*
7. ———: WEIGHT OF EVIDENCE. The Supreme Court will not pass upon the weight of the evidence, nor determine its credibility and value where it is conflicting, but will defer to the conclusions and findings of the trial court having the witnesses before it. *Anderson v. Griffith*, 549.

8. ———: APPEAL. An appeal to the Supreme Court, which is not taken at the term final judgment is rendered, will be stricken from the docket. *The State v. Rhodes*, 635.

PRESUMPTION.

1. EXECUTION, RETURN OF: PRESUMPTION. A return of a sheriff to an execution will be presumed to have been deposited with the clerk of the court on the return day, in the absence of anything to the contrary in such return or on the writ. *Marks v. Hardy*, 232.
2. ———: BURDEN OF PROOF: PRESUMPTION. If a party who has the means of information at hand makes the assertion that he relied on the statement of another, the burden is on him to establish the statement. For the law presumes that he who can see for himself, if he will but look, does look and finds out for himself, and if he asserts the contrary, he cannot prevail without overcoming the presumption thus arising. *Anderson v. McPike*, 293.
3. FRAUDULENT REPRESENTATION: KNOWLEDGE OF PERSON MAKING: PRESUMPTION. Fraud is not established and relief will not in general be granted without proof that the party who made the false representation knew at the time it was false. The law raises no presumption of knowledge from the mere fact that the representation is false. *Ib.*
4. ADMISSIONS IN PLEADINGS: EVIDENCE: PRESUMPTION, REBUTTAL OF. *Prima facie* the original answer of a defendant in a cause is competent evidence against him. But the testimony of the attorney, whose name is signed to the answer, that defendant did not employ him in the cause, is sufficient to overthrow the presumption arising from his name being signed as defendant's attorney and to exclude the answer as evidence. *Ib.*
5. CONSTITUTIONAL LAW: CONSTRUCTION: PRESUMPTION. Acts of the legislature are presumed to be constitutional, and it is only where they manifestly infringe on some provision of the constitution that they can be declared void for that reason. In case of doubt, every possible presumption, not directly inconsistent with the language and subject, is to be made in favor of the constitutionality of the act. *Phillips v. The Missouri Pacific Railway Company*, 540.

PRINCIPAL AND AGENT.

1. CORPORATION, NOTE OF: ACTS OF AGENTS. The authority of a corporation, or its officers, to issue its promissory note, need not be expressly given by its by-laws, or by formal resolution of the board of directors. Such authority can be inferred from the acquiescence of the corporation in, or the recognition by it of, the acts of its accredited officers in the regular course of its authorized business. *First National Bank of Hannibal v. North Missouri Coal & Mining Company*, 125.

2. **PRINCIPAL AND AGENT: SALE OF LAND: CONTRACT.** The owner of real estate situated in Kansas City, in this state, wrote from Chicago, Illinois, where he resided, to his agent, at Kansas City, in terms as follows: "Your letter received last night; I will leave the sale of the lots pretty much with you; if the party, or any one, is willing to pay sixty dollars per foot, one-third cash and balance one and two years, interest seven per cent. per annum, and pay commission of sale, I think I am willing to have you make out a deed and I will perfect it: I think you have the deeds to those lots, have you not? If you think better to try spring market, hold till then; the party buying may want the abstract in full, which I believe I have at Rockford, and will sell much less than cost. The above price is only for the present. * * * It is understood that if I pay the taxes now due, that hereafter I am relieved from any taxes." *Held*, that the letter authorized the agent to make a contract for the present sale of the lots. *Smith v. Allen*, 178.
3. ———: ———. Where such agent has the power to sell, he has the authority to sign an agreement in his principal's name and to bind him thereby. *Ib.*
4. **AGENTS AND TRUSTEES: PROFITS MADE IN BUSINESS OF PRINCIPAL.** An agent or trustee cannot unite in himself the opposite character of buyer and seller, and if he does so, the profits made by him may be charged with a trust for the benefit of the principal, unless the latter confirm the transaction with full knowledge of all the facts. So, too, if the agent make gains from the use of the trust funds or property, he must account therefor, and if the agent accept any benefits in conducting the business of his principal, he will hold them in trust for the latter. *Bent v. Priest*, 475.
5. **DIRECTORS OF CORPORATION: AGENTS AND TRUSTEES.** The directors of a corporation are trustees and agents of it and the stockholders, and, in general, are governed by the same rules as are applied to trustees and agents. *Ib.*
6. ———: **AGENT, KNOWLEDGE OF.** Knowledge of defects on the part of the agents of the employer, who are intrusted with the duty of procuring machinery and keeping the same in repair, is to be attributed to the employer. *Covey v. The Hannibal & St. Joseph Railroad Company*, 635.

PRINCIPAL AND SURETY.

1. **BANKRUPT: DISCHARGE OF SURETY.** C filed his voluntary petition to be adjudged a bankrupt, in May, 1878, and in November following, his wife proved up against his estate a note, which he had executed to her with defendant as surety thereon, and the wife thereafter assented to the final discharge of the bankrupt. *Held*, that, as the note was executed prior to January 1, 1869, such consent of the wife was unnecessary, and was, therefore, inoperative and did not discharge the surety. *Clark v. Clark*, 114.
2. ———: **SURETY.** Where the husband receives money from the wife and executes to her therefor his note, with another as surety

thereon., the transaction of itself shows that the money was not intended as a gift, and creates a valid obligation on the part of the husband to pay the note, which the wife can enforce against both him and the surety. *Ib.*

3. **GUARDIAN AND WARD: FINAL SETTLEMENT: SURETIES.** The judgment for the ward against the guardian on the final settlement is conclusive on the sureties on his bond, as it is likewise conclusive for them against the ward. *The State ex rel. Yeoman v. Hoshaw*, 193.
4. **SURETY, PAYMENT OF JUDGMENT BY.** While the payment of a judgment by a surety would, at law, extinguish the debt, and the surety could maintain his action of *assumpsit* for the amount paid the rule is otherwise in equity. In the latter forum the surety is entitled to be subrogated to all the securities held by the creditor, has a right to be put in his place and to that end, although the judgment is against both the principal and surety, he may, for his exoneration be subrogated to the judgment itself, and thus have the benefit of its lien and the priority it gave the creditor. *Ferguson's Administrator v. Carson's Administrator*, 673.
5. **ADMINISTRATION: DEBT AGAINST ESTATE: SURETY.** In the defence of an action commenced in the lifetime of the deceased for a debt then in existence, his administrator gave an appeal bond, and one F became surety for the estate thereon. Subsequently, F, as such surety, paid the judgment, and took an assignment of the same and presented his demand therefor against the estate. *Held*, that when the surety paid the debt it did not lose its character of a debt against the estate, and, therefore, was not within the rule prohibiting the allowance of any claim against the estate not in existence at the time of the death of the deceased. *Ib.*

PRIORITY.

- : —: **PRIORITY.** The creditor of a corporation can gain no priority by filing his motion for execution against a stockholder before the return day of the execution against the corporation. *Marks v. Hardy*, 232.

PROBATE COURT.

1. **PROBATE COURT: APPEAL.** An appeal lies, under Revised Statutes, section 292, from the refusal of the probate court to make a preliminary order of publication for the sale of real estate to pay debts of the estate. *Ferguson's Adm'r v. Carson's Adm'r*, 673.
2. —: **SALE OF REALTY TO PAY DEBTS.** When the petition for the sale of the real estate, and the accompanying lists and schedules are formal and regular, and the case thus made shows a proper cause for an order of sale, it is the duty of the court to make the order of publication. The law does not contemplate an investigation of the accounts, and an inquiry as to whether there is a deficiency of personal property, until after the proof of the order of publication, and all interested persons are thereby before the court. *Ib.*

PROCESS.

1. JURISDICTION: PROCESS: PRACTICE. Where an original petition states a cause of action against individuals, as constituting a co-partnership, and the amended petition states one against a corporation, the latter, before the court can have jurisdiction to render judgment, must be in court on voluntary appearance, or be brought in by service of process, and this is the case, although the firm name was the same as that of the corporation, and the stockholders in the latter composed said firm. *Thompson v. Allen*, 85.
2. ———: SERVICE OF PROCESS: JUDGMENT BY DEFAULT. In order to support a judgment by default against a corporation, it must appear of record that the person, who, the return of the officer shows, was served with process, has such a relation to the corporation that service on such person was tantamount to service on the corporation. *Cloud v. Inhabitants of Pierce City*, 357.
3. ———: ———. There are no statutory provisions in this state regulating the service of process upon cities or towns, and in the absence of such provisions, the manner of service still remains as at common law, and must be upon the mayor or other chief officer. *Ib.*
4. STATUTORY CONSTRUCTION: GENERAL STATUTES, 1865, CHAPTER 62. Chapter sixty-two, of the General Statutes of 1865, relates only to private corporations, and has no application to municipal corporations, and section thirty-four of this chapter does not relate to mesne, but only to final process. *Ib.*
5. PROCESS, CONSTRUCTIVE SERVICE OF: NOTICE. The doctrine of constructive service of process or notice is altogether the creature of statutory enactment, and has no existence, except where expressly declared by the law-making power. *Ib.*
6. JUDGMENT WITHOUT PROCESS. Where a party has not been brought into court by service of any process, a judgment rendered against him is *coram non judice* and void. *Ib.*
7. PROCESS, JURISDICTIONAL RECITAL OF IN RECORD, CONTRADICTION OF. Although the record contains the jurisdictional recital that "defendants have been duly served with process," it is competent to overthrow such recital by showing, by other parts of the record of equal dignity and importing equal verity, that such recital is untrue. And the return of the sheriff is a part of the record itself, and may, when radically defective, be used to rebut the presumption arising from recitals of service contained in other portions of the record. *Ib.*
8. JURISDICTION: PROCESS: JUDGMENT. Generally, the recital of jurisdiction or of service of process contained in the judgment will be construed in connection with the whole record, and will be deemed to refer to the kind of service shown by the other parts of the record. *Ib.*

9. ———: ———: ———. Where judgment has been rendered against a defendant corporation upon insufficient process, and the successor of such corporation appears in court and moves, for that reason, to set aside the judgment and asks leave to plead to plaintiff's petition, which is denied, such action does not, by relation, give jurisdiction where none existed before, nor confer on the judgment rendered a retrospective validity. *Ib.*

PURPORT.

See FORGERY, 3

PROMISSORY NOTES.

See BILLS AND NOTES.

PROXIMATE CAUSE

See NEGLIGENCE, 21.

RAILROADS.

1. RAILROAD: HIGHWAYS. It is the duty of a railroad company, without a statutory requirement to that effect, to so construct its road as not to prevent the public from using its highways, and this duty is a continuing one. *The State ex rel. Morris v. The Hannibal & St. Joseph Railway Co.*, 13.
2. MANDAMUS. Mandamus is an appropriate remedy to compel the restoration of a highway, by a railway, to its proper condition, and, in this respect, to require the company to perform its charter duties. *Ib.*
3. ———: RELATORS: PRIVATE CITIZENS. It is sufficient for the relators in such proceeding to show that they are citizens, and thus interested in the performance of a public duty. *Ib.*
4. RAILROAD: HIGHWAY, OBSTRUCTION OF. In a mandamus proceeding to compel a railway company to so construct its road as not to prevent the public from using a specified part of a highway, it is no defence that the track had formerly been placed in the highway by another railway company. Such fact is no justification of the continuance of the obstruction of the highway by defendant to the entire exclusion of the public. *Ib.*
5. ———: KILLING STOCK: PUBLIC CROSSING. In an action against a railroad for the negligent killing of plaintiff's cows by its trains, on a public crossing, mere proof that the speed of the trains was not checked, and that the cattle could have been seen eighty rods off, does not establish defendant's negligence. *Milburn v. The Kansas City, St. Joseph & Council Bluffs Railway Co.*, 104.

6. ——— : ——— : NEGLIGENCE OF OWNER. Where the owner of cattle sees them in danger on a railroad track, and can, by reasonable exertion, get them off, he is bound to do so, and if he does not, and they are injured by a passing train, he cannot recover. The owner, in such case, has no right to rely upon the performance of the duty which the law imposes on the company of giving warning signals. *Ib.*

7. NEGLIGENCE : RAILROAD : SPEED OF TRAINS. A railroad has the right to run its trains in excess of the usual rate of speed to make up lost time, but, in doing so, those in charge of the train should use greater vigilance and care to prevent accidents to workmen on the track. *Stephens v. The Hannibal & St. Joseph Railway Co.*, 221.

8. ——— : ——— : ———. Where an employe on the track is injured by a train so running at an unusual rate of speed, he cannot recover in the absence of evidence to show that the engineer did discover, or, by the exercise of care, could have discovered the plaintiff in time to have checked the train. *Ib.*

9. RAILROAD, CONSTRUCTION OF UPON PUBLIC HIGHWAY : STATUTE. A railway company cannot, under the statute (G. S., 1865, p. 233 ; R. S., 1879, sec. 765), construct its road along or upon a public highway, except with the consent of the county court, and if it does so without such consent, a court of equity will interfere and grant the county appropriate relief. *The State ex rel. Mahan v. The St. Louis, Keokuk & Northwestern Railway Co.*, 288.

10. ——— : ——— : LACHES. The profile and map of the route of the defendant company through the county was filed, as required by statute (G. S., 1865, p. 337), in the office of the clerk of the county court in April, 1878, and the present action to restrain the defendant from using the highway was instituted in January, 1882 ; held, there was no such delay on the part of the county as to preclude it from asserting its rights against the company. *Ib.*

11. PRACTICE : PARTIES : CONSIGNEE, RIGHT OF ACTION OF : RAILROAD : DAMAGES. The consignees of a car load of wheat screenings, shipped over a company's railroad, but which was destroyed before reaching its destination, may maintain an action against the railroad company for the recovery of damages for such destruction. *Kirkpatrick v. The Kansas City, St. Joseph & Council Bluffs Railway Company*, 341.

12. ——— : ——— : ——— : ———. Where the consignee of goods shipped upon a railroad pays the draft drawn on him by the shipper, and receives the bill of lading to which the draft is attached, and subsequently purchases the goods from the owner, he thereby becomes the real party in interest under the code. R. S., sec. 3462. And it makes no difference that the goods were destroyed before the absolute sale, as the property of the owner in them still continued and was the subject of the transfer, and the transferee could maintain action for damages for their destruction on the ground of such transfer.. *Ib.*

13. RAILROAD : CROSSING OUT OF REPAIR. Where a railroad owes no

duty to one to keep a private crossing in repair, he cannot recover for an injury sustained by his wagon thereon caused by the crossing being out of repair. *Mann v. The Chicago, Rock Island & Pacific Railroad Company*, 347.

14. ——— : ——— : NOTICE. A railroad is not liable for an injury resulting from its crossing being out of repair, unless it had notice of such fact, or the defect existed a sufficient length of time to justify the presumption of notice. *Ib.*
15. ——— : PASSENGER ALIGHTING FROM TRAIN : NEGLIGENCE. In an action against a railroad company by a passenger for injuries received in alighting from a train at the company's station, if the train did not stop a sufficient length of time to enable the plaintiff, by the use of reasonable expedition, to get off before it was again started, and it was so started while plaintiff was in the act of alighting, whereby he was thrown down and injured, the company is liable for the injury. Affirming *Straus v. Kansas City, St. Joseph & Council Bluffs Railway Company*, 75 Mo. 185. *Straus v. The Kansas City, St. Joseph & Council Bluffs Railway Company*, 421.
16. ——— : ——— : ———. If the train was stopped a sufficient length of time for plaintiff to conveniently alight, and without any fault of defendant's servants, he failed to do so, and the conductor not knowing, and not having reason to suspect that the plaintiff was in the act of alighting, caused the train to start while he was so alighting, the defendant would not be liable. *Ib.*
17. ——— : ——— : ———. If a conductor has reason to believe that any passenger who has reached his destination, though dilatory, may be in the act of alighting, and he starts his train without examination, or inquiry, and such passenger is in the act of alighting when the train is started, and is thereby injured, the company will be liable. *Ib.*
18. ——— : ACTION FOR DEATH OF PERSON : CONTRIBUTORY NEGLIGENCE. One who recklessly or carelessly goes upon the track of a railroad company, without looking or listening for an approaching train, and is thereby killed, when, by looking or listening, he would have been apprised of the approach of the train, is guilty of such contributory negligence as to preclude a recovery in an action for his death, notwithstanding the train was, at the time, running at a rate of speed forbidden by an ordinance of the city in which the accident occurred, and also failed to ring its bell. *Taylor v. The Missouri Pacific Railway Company*, 457.
19. ——— : CONDEMNATION PROCEEDING : LIFE ESTATE. The owner of a life estate in land condemned for a right of way for a railroad, is entitled to the same estate in the money paid into court under the condemnation proceedings. *The Kansas City, Springfield & Memphis Railway Co. v. Weaver*, 473.
20. ——— : ——— : ———. A judgment creditor of the remainderman in such life estate can assert no claim to any part of said money during the continuance of the life estate. *Ib.*

21. ——— : KILLING STOCK : JURISDICTION : JUSTICE OF PEACE. In an action brought before a justice of the peace against a railroad for double damages for killing stock, the fact that the killing occurred in the township where the suit was brought, or in an adjoining township, is a jurisdictional one. It is not sufficient that such jurisdictional fact be averred in the statement; it must also be shown by the evidence. *Backenstoe v. The Wabash, St. Louis & Pacific Railway Co.*, 492.
22. ——— : ——— : ———. Proof simply that the killing occurred within the corporate limits of a town is not sufficient to warrant the jury in finding that it occurred in the township charged in the statement. *Ib.*
23. DOUBLE DAMAGE ACT, CONSTITUTIONALITY OF. The former decisions of this court holding that the double damage act (R. S., sec. 809) is not in contravention of either the state or federal constitution, sustained. *Phillips v. The Missouri Pacific Railway Co.*, 540.
24. CONTRIBUTORY NEGLIGENCE : DEMURRER TO EVIDENCE. The evidence of the plaintiff in this case, which was an action for injuries received from defendant's train, in attempting to cross a street in the city of St. Louis, held, not to warrant a demurrer to the evidence for defendant, on the ground that it showed that plaintiff had failed to look or listen before attempting to cross the track. *Drain v. The St. Louis, Iron Mountain & Southern Railway Co.*, 574.
25. ——— : ———. Where the evidence of plaintiff, relied on to show that he was guilty of contributory negligence, is vague, ambiguous, and uncertain, and does not clearly, or conclusively show such negligence on his part, the case should not be taken from the jury. *Ib.*
26. ——— : NEGLIGENCE OF DEFENDANT AFTER DISCOVERY OF. Although one who is struck and killed by a train while standing on a railroad track is guilty of contributory negligence in so being in a place of peril and danger, yet the railroad will still be liable for the accident if its engineer discovered the danger of the deceased, and, after such discovery, by the use of any means within his power consistent with the safety of the train, could have avoided the injury. *Bell v. The Hannibal & St. Joseph Railway Co.*, 599.
27. PROXIMATE CAUSE. The failure of the engineer in such case to use the means possessed at the time and adequate to prevent the injury is the proximate cause of the accident. *Ib.*
28. THE PLEADINGS IN THIS CASE held to raise the question of the railroad's negligence after becoming aware of the danger of the deceased, and also, held that the evidence presented a proper question for the jury thereon. *Ib.*

On re-hearing.

29. UPON A REVIEW AND RECONSIDERATION of the whole case, held that the death of the deceased was occasioned directly and solely by

his own gross carelessness in going and remaining upon the railroad track, without looking, or listening for the approach of the train, and that there is no evidence in the record that the servants of defendant in charge of the engine and train could have avoided the injury after discovering the danger of the deceased, or that upon the discovery of his presence and peril upon the track they failed or omitted to use any means within their power to avoid and prevent the accident. and that, therefore, the demurrer to the evidence should have been sustained (Ray, J., dissenting). *Ib.*

30. RAILROADS : DOUBLE DAMAGE ACT, CONSTITUTIONALITY OF. The former decisions of this court, upholding the constitutionality of the double damage act, as regards both the constitution of this state and of the United States, sustained. *Hines v. The Missouri Pacific Railway Company*, 629.
31. ——— : RECEIVER, ACTION AGAINST : CONTRACT. An action can be brought in a state court against a receiver of a railroad by permission of the United States court which appointed him, for the breach of a contract for the purchase of ties, made by the railroad before the appointment of the receiver. *Harding v. Nettleton*, 658.
32. RECEIVER : JUDGMENT. The judgment of the state court cannot be enforced against the property of the corporation in the hands of the receiver, but must be presented to the United States court for allowance, and the latter court will determine the manner and time of paying it out of the assets of the road. *Ib.*

REASONABLE TIME.

See ADMINISTRATION 2, 3.

RECEIVER.

1. PARTNERSHIP : RECEIVER, POWER OF COURT TO APPOINT : JURISDICTION. The circuit court has original jurisdiction in all matters of equity, and has inherent power, independent of any statute authorizing it, to appoint a receiver in the settlement of partnership affairs, where there is no statute depriving it of such power. *Cox v. Volkert*, 505.
2. RECEIVER, APPOINTMENT AND AUTHORITY OF. Where the order appointing a receiver gives him "full power to collect the rents, take care of and preserve the same," he is authorized thereby to collect the rents to become due after the appointment as well as those due at the date of the appointment. *Ib.*
3. RECEIVER, AUTHORITY OF TO SUE. Where a receiver brings suit in the court by which he was appointed, and prosecutes the same with its sanction, it is not necessary to produce an express order so to do, *Ib.*

4. RECEIVER, EFFECT OF APPOINTMENT : LESSOR AND LESSEE. The appointment of a receiver does not affect the rights of parties to a lease executed by those for whom he acts, and whatever defences, counter-claims, or set-offs, the lessee would have had in a suit by the lessors are available to the lessee, in a suit by the receiver, and the lessee may plead any failure of the lessors to perform their part of the contract. *Ib.*
5. RAILROAD: RECEIVER, ACTION AGAINST : CONTRACT. An action can be brought in a state court against a receiver of a railroad by permission of the United States court which appointed him, for the breach of a contract for the purchase of ties, made by the railroad before the appointment of the receiver. *Harding v. Nettleton*, 658.
6. RECEIVER : JUDGMENT. The judgment of the state court cannot be enforced against the property of the corporation in the hands of the receiver, but must be presented to the United States court for allowance, and the latter court will determine the manner and time of paying it out of the assets of the road. *Ib.*

REFeree.

1. ——— : REFEREE : CONTEMPT. The referee appointed to conduct the examination under Revised Statutes, section 2410, has authority to commit the execution debtor for contempt where he refuses to answer proper questions. *The State ex rel. Ames v. Barclay*, 55.
2. ——— : ——— : ———. The fact that the debtor was a grand juror at the time of the examination does not exempt him from the operation of the statute, he having appeared and submitted to such examination, and without having made any such suggestion, until after he refused to answer the questions on other grounds. *Ib.*

REMAINDER.

See LIFE ESTATE.

RENTS AND PROFITS.

1. WIDOW'S RIGHT TO MANSION HOUSE : DOWER : EJECTMENT : RENTS AND PROFITS. The widow has the right to remain in and enjoy the mansion house of her deceased husband, and the messuages and plantation thereto belonging, until dower is assigned to her ; this right can only be terminated by the assignment of dower, and ejectment will lie to enforce her right of possession to such lands, and she is entitled to the whole of the rents where there is no outstanding lease at the date of her husband's death. *Roberts v. Nelson*, 21.
2. DEATH OF WIDOW PENDING SUIT : REVIVAL IN NAME OF ADMINISTRATOR : EJECTMENT : DAMAGES. Where the widow dies, pending an action of ejectment by her for the recovery of possession of the mansion house and messuages, the suit may be revived in the name

of her administrator, and recovery had for rents and profits, by way of damages, to the time of her death. *Ib.*

REPLEVIN.

1. REPLEVIN : INSTRUCTIONS. A series of instructions, in an action for the recovery of specific personal property, approved. *Ingle v. Mudd*, 216.
2. ——— : TORT, ASSIGNMENT OF. Replevin will lie for the possession of mules stolen from the owner in favor of his assignee of the right of action therefor. Following *Snyder v. Railway*, post, 613. *Doering v. Kenamore*, 588.

RESULTING TRUSTS.

See TRUSTS AND TRUSTEES, 6. 7.

RETROSPECTIVE LEGISLATION,

See CONSTITUTIONAL LAW.

ROADS AND HIGHWAYS.

1. RAILROAD : HIGHWAYS. It is the duty of a railroad company, without a statutory requirement to that effect, to so construct its road as not to prevent the public from using its highways, and this duty is a continuing one. *The State ex rel. Morris v. Hannibal & St. Joseph Railroad Company*, 13.
2. MANDAMUS. Mandamus is an appropriate remedy to compel the restoration of a highway, by a railway, to its proper condition, and, in this respect, to require the company to perform its charter duties. *Ib.*
3. ——— : RELATORS : PRIVATE CITIZENS. It is sufficient for the relators in such proceeding to show that they are citizens and thus interested in the performance of a public duty. *Ib.*
4. RAILROAD : HIGHWAY, OBSTRUCTION OF. In a mandamus proceeding to compel a railway company to so construct its road as not to prevent the public from using a specified part of a highway, it is no defence that the track had formerly been placed in the highway by another railway company. Such fact is no justification of the continuance of the obstruction of the highway by defendant to the entire exclusion of the public. *Ib.*

ST. JOSEPH.

See STREET IMPROVEMENT.

ST. JOSEPH BOARD OF PUBLIC SCHOOLS.

- ST. JOSEPH BOARD OF PUBLIC SCHOOLS : BONDS : AUTHORITY TO ISSUE.** The St. Joseph board of public schools had authority, by virtue of General Statutes, 1865, chapter 47, section 11, to issue, during the years 1868 and 1871, its bonds to raise money to build school houses; and, also, to issue its renewal refunding bonds, under Revised Statutes, 1879, section 7034. *The St. Joseph Board of Public Schools v. Gaylord*, 401.

ST. LOUIS CITY.

1. **ST. LOUIS CITY : PUBLIC STREETS : WELLS.** The city of St. Louis has the right to abolish wells situated within the limits of its public streets. *Ferrenbach v. Turner*, 416.
2. ——— : **WELLS : LICENSE. REVOCATION OF.** The passage of an ordinance by the city, directing its street commissioner to fill up said wells, operates as a revocation of any license, express or implied, to construct the wells in the street. *Ib.*
3. ——— : ———. The city can abolish said wells at the public expense, and the persons who construct them are not entitled to compensation for their loss. *Ib.*

SALE.

1. **JUDGMENT : EXECUTION : SALE.** A sale under an execution issued upon an original judgment, which conforms to a judgment *nunc pro tunc*, instead of such original judgment, is invalid. *Coe v. Ritter*, 277.
2. ——— : **SALE BY ASSIGNEE WITHOUT ORDER OF COURT.** The sale of property by the assignee without an order of court does not render the sale fraudulent, nor does such fact affect the validity of the deed of assignment. *Jeffries v. Bleckmann*, 350.
3. **CONDITIONAL SALE OF PERSONAL PROPERTY : STATUTE.** The vendor of personal property may contract with his vendee that the title shall remain in the former until the purchase price is paid, and such contract will be valid as against creditors of the vendee or purchasers from him with notice of the contract, although such condition was not evidenced by writing, executed and acknowledged by the vendee and recorded, as required by statute. R. S., secs. 2505, 2507. *Coover v. Johnson*, 533.
4. **HOMESTEAD, FAILURE OF OFFICER TO ASSIGN : SALE NOT VOID.** The failure of a sheriff, selling, under execution, land which contains a homestead, to assign such homestead to the debtor does not render the sale void. *Crisp v. Crisp*, 630.

5. ———. The court may, in ejectment brought for the premises by the purchaser at the sale, cause the homestead to be assigned. *Ib.*

See SHERIFF'S DEED 2, 3.

SCHOOLS.

- ST. JOSEPH BOARD OF PUBLIC SCHOOLS: BONDS: AUTHORITY TO ISSUE.** The St. Joseph board of public schools had authority, by virtue of General Statutes, 1865, chapter 47, section 11, to issue, during the years 1868 and 1871, its bonds to raise money to build school houses; and, also, to issue its renewal refunding bonds, under Revised Statutes, 1879, section 7034. *The St. Joseph Board of Public Schools v. Gaylord*, 401.

SETTLEMENT.

- SETTLEMENT, IMPEACHMENT OF: NOTE.** Where a settlement of accounts has taken place between parties and a note payable to a third person is given in satisfaction of the amount found to be due, in an action on such note by the indorsee, the maker, without bringing all the parties interested into court, cannot impeach such settlement, nor show that the note was without consideration. *The First National Bank of Hannibal v. The North Missouri Coal and Mining Company*, 125.

SHERIFF'S DEED.

1. **SHERIFF'S DEED: JUDGMENT: NOTICE: CITATION.** A sheriff's deed, based upon certain judgments of the county court for principal and interest due upon township school bonds, under Revised Statutes, 1855, where such judgments recite a notice, but not a citation, as provided for by Revised Statutes, 1855, page 1425, section 29, is void. *Roberts v. Nelson*, 21.
2. ———: ———: **SALE.** Such deed is void where the sale under the judgment is made at the sitting of the county court, instead of during a term of the circuit court. *Ib.*
3. ———: ———: ———: **DOWER.** Where a sheriff's deed is based upon a judgment against the husband and a sale thereunder before his death, it will not deprive the widow of her dower, and until dower is assigned to her she will be entitled to the possession of the property. *Ib.*

SIGNIFICATION OF TERMS.

- SIGNIFICATION OF TERMS.** "Without notice" and "in good faith" are equivalent terms. *Cooter v. Johnson*, 533.

SPECIAL LAW.

1. **REVISED STATUTES, SECTION 2835, CONSTITUTIONALITY OF.** Section

2835, of the Revised Statutes, is not in violation of article four, section fifty-three, subdivision seventeen, of the constitution of Missouri, prohibiting the general assembly from passing "any local or special law regulating the jurisdiction of justices of the peace," nor is it a special act because directed against railroads alone, *Phillips v. Missouri Pacific Railway Company*, 540.

2. SPECIAL LAW. An act of the legislature which applies to and embraces all of a class of persons who are or may come into like situations or circumstances, is not a special law. *Ib.*

SPECIFIC PERFORMANCE.

PAROL CONTRACT FOR SALE OF LANDS : SPECIFIC PERFORMANCE : STATUTE OF FRAUDS. Where one seeks the specific performance of a parol contract for the sale of land, and makes out a case of part performance sufficient to take the case out of the statute of frauds, the court should find the balance due on the purchase price, if any, and on payment of the same into court vest the title in the vendee. *Webb v. Toms*, 591.

STATUTES CITED AND CONSTRUED.

REVISED STATUTES OF 1879.

Section 292, see page 673.	Section 2121, see page 599.
Section 736, see pages 232, 466.	Section 2410, see page 55.
Section 765, see page 288.	Section 2505, see page 533.
Section 809, see page 540.	Section 2507, see page 533.
Section 938, see page 239.	Section 2693, see page 544.
Section 939, see page 239.	Section 2835, see page 540.
Section 995, see page 684.	Section 3052, see page 681.
Section 1262, see page 623.	Section 3248, see page 643.
Section 1263, see page 169.	Section 3296, see page 382.
Section 1691, see page 18.	Section 3469, see page 341.
Section 1772, see page 371.	Section 3671, see page 277.
Section 1773, see page 371.	Section 3705, see page 71.
Section 1891, see page 33.	Section 7034, see page 401.

WAGNER'S STATUTES, 1873.

Page 150, § 1, see page 350.

GENERAL STATUTES, 1865.

Chapter 41, p. 239, see page 357.

Chapter 47, § 11, see page 401.

Chapter 62, see page 357.

Page 328, § 11, see page 466.

REVISED STATUTES, 1855.

Page 1425, § 29, see page 21.

ACTS OF 1859.

Page 74, see page 466.

ACTS OF 1881.

Page 171, see page 277.

REVISED STATUTES OF UNITED STATES.

Section 2291, see page 501.

STATUTE OF FRAUDS.

See Fraud, 4, 5.

STOCKHOLDER.

1. CORPORATION : STOCKHOLDER : ABATEMENT. A proceeding by motion under Revised Statutes, section 736, to subject a stockholder to execution on a judgment against the corporation to the extent of the unpaid balance of his stock, does not abate on the death of the stockholder. *Marks v. Hardy*, 232.
2. MOTION AGAINST STOCKHOLDER FOR UNPAID STOCK SUBSCRIPTION : DEATH OF STOCKHOLDER. While such execution cannot issue against the estate of the deceased stockholder on the final adjudication on the motion, yet such adjudication may be regarded as a demand against the estate, and be classed as such. *Ib.*
3. ——— : RETURN OF NULLA BONA. If the officer having the execution against the corporation makes a part of the debt and returns the writ *nulla bona* as to the residue, a sufficient foundation is laid to proceed, under the statute, against the stockholder for such residue. *Ib.*
4. ——— : SHERIFF'S RETURN TO EXECUTION AGAINST CORPORATION. It is not necessary, in order that the stockholder may be proceeded against, that the sheriff's return to the execution against the corporation should negative the ownership of all property whatever by it. A fair and substantial *nulla bona* return is all that is required, *Ib.*

STREET IMPROVEMENT.

1. STREET IMPROVEMENTS : TAX-BILLS, AMENDMENT OF. It was compe-

tent for the city engineer of the city of St. Joseph, after making out tax bills for macadamizing, curbing and guttering two streets, on discovering that the block had been subdivided into lots, to correct and certify anew the bills, and he could so do, whether he was out of office or was holding the same as his own successor. *Morley v. Weakley*, 451.

2. ——— : ——— : PLEADING. Although the petition stated that each lot was charged for the work done in front of it, and that the engineer computed the cost of the work done "in front of and adjoining the lot," and not for the proportionate share of the cost of the whole work, yet, as in this connection, the cost is alleged to have been that which is chargeable to the whole lot, and that the amount assessed was the proportionate cost of the work under the act authorizing it, and which act is sufficiently referred to, the petition is sufficient. *Ib.*
3. ORDINANCES : MAYOR : CONTRACT. The city ordinances did not require the mayor to act separately in awarding the contract, but that he should act in conjunction with the city council, as its presiding officer. *Ib.*
4. STREET IMPROVEMENT : BIDS, ADVERTISEMENT FOR. It was not necessary that the advertisements for bids should state the amount of work to be done where they showed the streets between which and on which the work was to be done, and stated the different classes of work. *Ib.*
5. ——— : SPECIFICATIONS : ORDINANCES. The ordinances, with respect to macadamizing, curbing and guttering, provide in detail, as to the material and manner of doing this class of work, and the general ordinance, requiring a plan or profile of the work with specifications to be on file where bids are advertised for any public improvement, has no application. The latter ordinance should not be construed to require the city engineer to do that by specifications which is clearly stated in the ordinance. *Ib.*
6. ——— : LOST BID : EVIDENCE. Where a bid for macadamizing, etc., a street is lost, the loss being shown, parol evidence of its contents is admissible, and the fact that no record, or an imperfect account of the bid was kept, will not prevent plaintiff from showing its true contents. *Ib.*

STREET RAILWAYS.

1. CITY OF KANSAS : STREET RAILWAYS : ORDINANCE. Section one of the ordinance of June 29, 1890, of the City of Kansas, relating to street railways, does not require such railways, or any officer thereof, to pave the street on which their cars are operated. *The City of Kansas v. Corrigan*, 67.
2. ORDINANCE : STREET RAILWAY COMPANY : CONTRACT. Where an ordinance of a city, which grants to a horse railway company the privilege of using its streets, requires such railway to keep portions of the street, on which it operates, in good repair, the city cannot, by

a subsequent ordinance, compel the company to pave such portions of its street with specified materials, or punish any one concerned for operating the cars of the company, where the paving was not done. Such later ordinance would be an interference with the contract between the city and the railway as contained in the ordinance granting the latter its franchise. *Ib.*

SUBSTITUTION.

See PARTIES, 2.

SUPERSEDEAS.

ATTACHMENT : INTERPLEA : APPEAL : SUPERSEDEAS : EXECUTION, WHEN OFFICER NOT LIABLE FOR FAILURE TO LEVY. The pendency of the appeal of an interpleader from the judgment of a justice of the peace in an action of attachment, where bond is given by the interpleader, operates as a *supersedeas* in the cause, and prevents the sale of the attached property pending such appeal, and an officer is not liable in such case for failure to levy an execution issued against the property interpleaded. *The State ex rel. Boyington v. Ranson*, 327.

TAX BILLS.

See STREET IMPROVEMENT, 1.

TAX DEED

1. **TAX DEED : STATUTE.** Where the statute prescribes a form for a tax deed, such form becomes a matter of substance and must be strictly followed. *Hopkins v. Scott*, 140.
2. ——— : ———. Where the statute provides that the tax deed shall be substantially in the form prescribed such form must be substantially, although not literally, complied with. *Ib.*
3. ——— : **OMISSION OF RECITALS PRESCRIBED BY STATUTE.** While it is not necessary, in the latter case, to make the recitals in the words employed in the prescribed form, yet it is necessary that the recitals required in such form be substantially made, and if not so made, such omission is fatal to the deed. *Ib.*
4. ——— : ———. The omission in a tax deed of the words, "for the payment of taxes, interest and costs then due and unpaid on said real property," is fatal to such deed, the statute having prescribed a form containing such recital and requiring that the deed should substantially comply with the form. *Ib.*
5. **STATUTE OF LIMITATIONS : VOID TAX DEED.** A tax deed omitting such recital is void on its face, and the special three years statute of limitations does not run in favor of the person holding possession under such deed. *Ib.*

TENANTS IN COMMON.

CONSTRUCTION OF STATUTE: HOMESTEAD: TENANTS IN COMMON. Under section 2291, Revised Statutes of United States, where both father and mother die before perfecting an entry of a homestead, and receiving a patent therefor, their heirs are entitled to a patent upon making proof of the facts required by said section, and take as tenants in common. *Crumb v. Hambleton*, 501.

TENOR.

See FORGERY, 3.

TITLE.

1. EJECTMENT: TITLE. The elder title when the better one must prevail in an action of ejectment. *Farrar v. Heinrich*, 521.
2. TITLE BY ADVERSE POSSESSION. An actual, adverse, open, and continuous possession of land under a claim and color of right from 1836 to 1860 was sufficient, not only to bar recovery by those claiming under an elder title, but conferred title upon those claiming under such adverse possession. *Ib.*
3. TRESPASS: ADVERSE POSSESSION. When both parties claim title by possession under color of title, the origin of each being an act of trespass, the one being a trespass on the constructive possession and the other a trespass on the actual possession under the later title, the same rule of law as to the title passing by adverse possession applies to each. *Ib.*

TITLE BOND.

1. LAND AND LAND TITLES: TITLE BOND, SURRENDER OF. The holder of a title bond to land, who surrenders it to him who executed it thereby obliterates whatever equitable right he may have theretofore had in the land. *Anderson v. McPike*, 293.
2. TITLE TO LAND: UNRECORDED TITLE BOND: NOTICE. A purchaser of land for value, without notice of an unrecorded title bond, will take a clear title against any right growing out of such bond. *Ib.*

TORT.

1. REPLEVIN: TORT, ASSIGNMENT OF. Replevin will lie for the possession of mules stolen from the owner in favor of his assignee of the right of action therefor. Following *Snyder v. Railway*, post, 613. *Doering v. Kenamore*, 588.
2. TORT TO PROPERTY: ASSIGNABILITY OF ACTION FOR CODE. A right of action arising from a tort to property is assignable under the

code (overruling *Wallen v. Railway*, 74 Mo. 521). *Snyder v. The Wabash, St. Louis & Pacific Railway Co.*, 613.

TRESPASS.

1. TRESPASS: POSSESSION. Possession of real estate is a pre-requisite to an action for trespass, and one who is not in possession cannot maintain the action. *Lindenbower v. Bentley*, 515.
2. ———: ———: LANDLORD AND TENANT. A tenant to whom land is rented, is entitled to its exclusive possession, and being in exclusive possession, the landlord out of possession cannot maintain trespass. *Ib.*
3. TRESPASS: ADVERSE POSSESSION. When both parties claim title by possession under color of title, the origin of each being an act of trespass, the one being a trespass on the constructive possession and the other a trespass on the actual possession under the later title, the same rule of law as to the title passing by adverse possession applies to each. *Farrar v. Heinrich*, 521

TRUSTS AND TRUSTEES.

1. TRUSTEE, PURCHASE BY OF OUTSTANDING TITLE. A trustee who holds the legal title for the benefit of another cannot speculate with the trust property. He cannot purchase an outstanding title and hold it for his own use, and it matters not that such title was acquired by purchase at a judicial sale, or that it is superior to the one conveyed to him in trust; and this rule is as applicable to a trustee holding the legal title to a railroad for the use of its bondholders as to other cases. *Baker v. The Springfield & Western Missouri Railway Company*, 75.
2. ———. Nor can a trustee, who has acquired such outstanding title require, in an action of ejectment for the railroad, the latter to refund to him the amount paid by him for such title. *Ib.*
3. AGENTS AND TRUSTEES: PROFITS MADE IN BUSINESS OF PRINCIPAL. An agent or trustee cannot unite in himself the opposite character of buyer and seller, and if he does so, the profits made by him may be charged with a trust for the benefit of the principal, unless the latter confirm the transaction with full knowledge of all the facts. So, too, if the agent make gains from the use of the trust funds or property, he must account therefor, and if the agent accept any benefits in conducting the business of his principal, he will hold them in trust for the latter. *Bent v. Priest*, 475.
4. DIRECTORS OF CORPORATION: AGENTS AND TRUSTEES. The directors of a corporation are trustees and agents of it and the stockholders, and, in general, are governed by the same rules as are applied to trustees and agents. *Ib.*
5. TRUSTS AND TRUSTEES. Where fiduciary relations exist between

partia., the trustee cannot purchase property in which his beneficiary has an interest, without such property becoming impressed in his hands with the nature of the trust, and it makes no difference that the trustee did not purchase at the sale, but afterwards and during the existence of such relations, took the bid of a stranger off his hands. *Shaw v. Shaw*, 594.

6. **RESULTING TRUSTS: STATUTE OF FRAUDS: EVIDENCE.** Resulting trusts are not within the statute of frauds, and parol evidence may be resorted to, to establish them, but to have that effect, such evidence must be almost conclusive in its character. *Ib.*
7. ———: **PURCHASE MONEY.** The controlling question in the consideration of resulting trusts is the ownership of the purchase money. If such ownership be established in such manner as to leave no room for reasonable doubt in the mind of the chancellor, the resulting trust springs into being, by implication of law, and follows the ownership of the money. And the same rule holds as to a portion of the purchase money as to all of it, the resulting trust attaching in the ratio of ownership. *Ib.*
8. ———: ———: **PRACTICE: TRUSTEE.** So long as proceedings in bankruptcy are pending, the assignee is the only proper person to sue, and the creditors are bound to assert their rights as such by and through the assignee, who is a trustee for the creditors and the bankrupt, with power to collect the assets and convert the assigned property into money and distribute it among the creditors. When this is done and the proceedings are brought to an end his trust ceases, and whatever is left in his hands becomes the property of the bankrupt by operation of law, without any formal discharge of the assignee or re-transfer. *Peery v. Carnes*, 652.
9. ———: **PRACTICE: BANKRUPT.** After the assignee's trust has ceased and the bankrupt has been discharged the latter is the proper party to sue for demands due himself, at, the time he was adjudged a bankrupt. *Ib.*

VALUE.

FALSE ASSERTION OF VALUE: WARRANTY: OPINION. A mere false assertion of value, where no warranty is intended, is no ground of relief to a purchaser, because such assertion is a mere matter of opinion, which does not imply knowledge and is a thing about which men may differ. Mere expression of judgment or opinion does not amount to warranty. *Anderson v. McPike*, 293.

VENDOR'S LIEN.

See LIEN.

VENDOR AND VENDEE.

LAND, PURCHASE OF: POSSESSION: VENDOR AND VENDEE. Where the

vendor of land, at the time of contracting, refuses to put the vendees in possession, and the conveyance is accepted on such terms, it is not the vendor's duty to put the vendees in possession. *Anderson v. McPike*, 293.

VENUE.

1. ——— : VENUE, PROOF OF. Venue need not be proved by direct evidence, but may be proved indirectly. *The State v. Jackson*, 18.
2. ——— : LARCENY : VENUE. One who steals property in one county and takes it into another may be indicted, tried and convicted in the latter county. Where one steals cattle in one county, and they escape from him, and he pursues them into another county, and there takes possession of them as his property, and disposes of them, as such, he is guilty of stealing the property in the latter county. R. S., sec. 1691. *Ib.*
3. ——— : ——— : EVIDENCE : VENUE. The possession of a forged instrument, or the uttering of it in the county where the indictment is found, is strong evidence to show that the forgery of the instrument was committed by him in the same county. *The State v. Yerger*, 33.
4. ——— : CHANGE OF VENUE. The finding of the trial court in a criminal case, on the question of the prejudice of the inhabitants of the county, on the hearing of an application for a change of venue, will not be interfered with by the Supreme Court, unless palpable injustice has been done the defendant. *The State v. Holcomb*, 371.

VERDICT.

1. VERDICT. A verdict for plaintiff in ejectment is sufficiently definite in its description of the premises, if the boundary lines as fixed by the verdict can be traced thereon. *Bnse v. Russell*, 209.
2. ———. A verdict held not open to the objection of being too indefinite and uncertain. *Musser v. Adler*, 445.

VICE-PRINCIPAL.

See MASTER AND SERVANT, 4, 12.

WARRANTY.

FALSE ASSERTION OF VALUE : WARRANTY : OPINION. A mere false assertion of value, where no warranty is intended, is no ground of relief to a purchaser, because such assertion is a mere ~~matter~~ ^{matter} of opinion, which does not imply knowledge, and is a thing about which men may differ. Mere expression of judgment or opinion does not amount to warranty. *Anderson v. McPike*, 293.

WELLS.

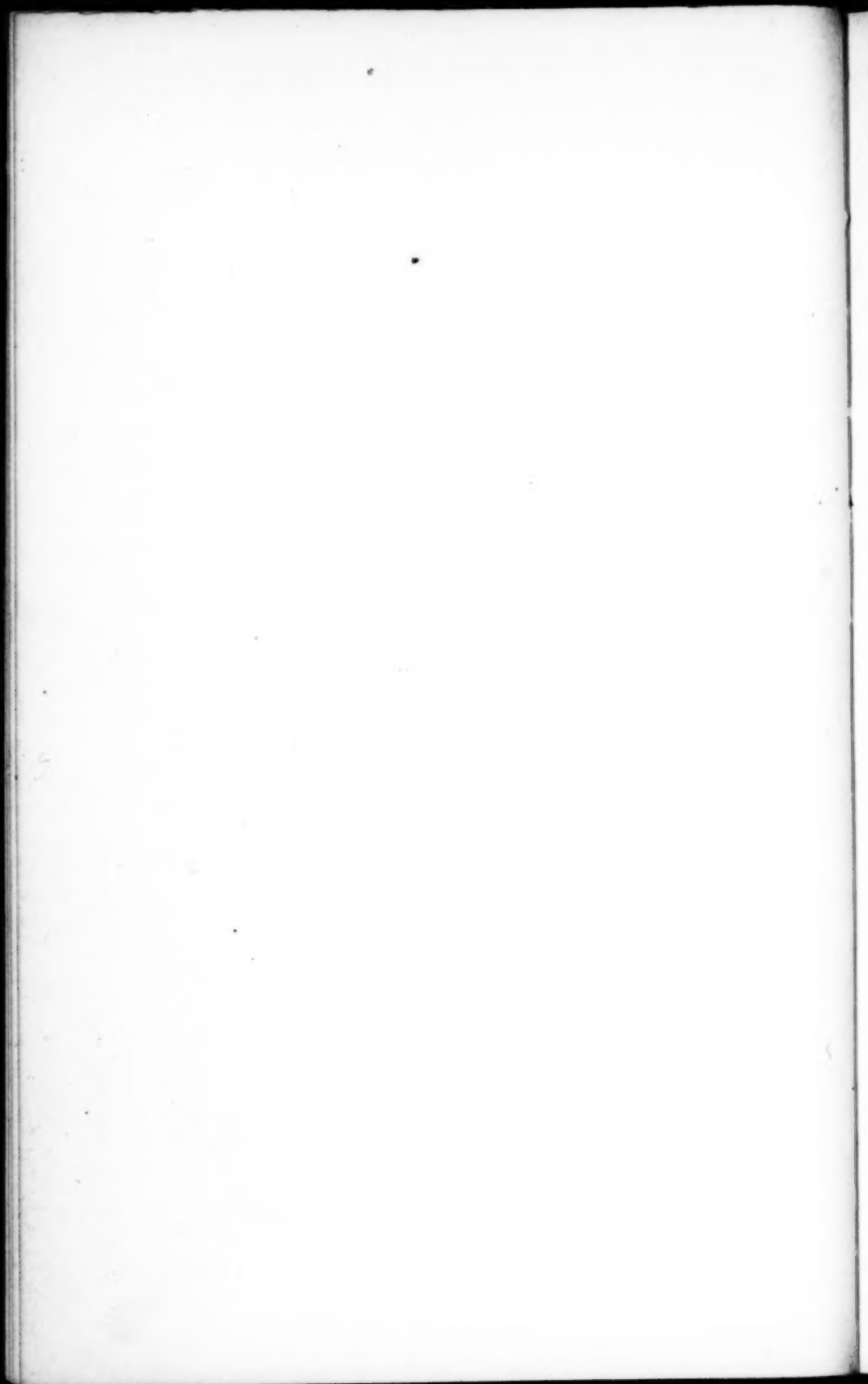
See ST. LOUIS CITY.

WEIGHT OF EVIDENCE.

1. PRACTICE IN SUPREME COURT : WEIGHT OF EVIDENCE. The Supreme Court will not pass upon the weight of the evidence, nor determine its credibility and value where it is conflicting, but will defer to the conclusions and findings of the trial court having the witnesses before it. *Anderson v. Griffith*, 549.
2. PRACTICE : WEIGHT OF EVIDENCE : DEMURRER. It is not the province of the court to determine the weight of the evidence, and where it is conflicting, a demurrer to the evidence, and instructions of a like character, are properly refused. *Covey v. The Hannibal & St. Joseph Railway Company*, 635.

WITNESSES.

1. ——— : EVIDENCE : OPINION OF WITNESS. It is not reversible error for a non-expert witness, who testifies to the facts in a case, to give an opinion based upon such facts. *Straus v. The Kansas City, St. Joseph & Council Bluffs Railway Co.*, 421.
2. EVIDENCE : HUSBAND, COMPETENCY AS WITNESS. A husband, who is a co-plaintiff with his wife in an action under Revised Statutes, section 2121, for the death of their son, is a competent witness on the trial of the cause. *Bell v. The Hannibal & St. Joseph Railway Co.*, 599.



RULES FOR THE GOVERNMENT
OF THE
Supreme Court of Missouri.

Adopted at the April Term, 1877.

Chief Justice, his duty.

RULE 1. The Chief Justice shall superintend matters of order in the court room.

Motions to be written, signed and filed.

RULE 2. All motions in a cause shall be in writing, signed by counsel and filed of record.

Argument of motions.

RULE 3. No motion shall be argued unless by the direction of the court.

Taking record from clerk's office.

RULE 4. No member of the bar shall be permitted to take a record from the clerk's office without the written permission of some judge of the court.

Diminution of record, suggestion after joinder in error.

RULE 5. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

Application for certiorari.

RULE 6. Whenever a *certiorari* may be applied for, there shall be an affidavit of the defect in the transcript which it is designed to supply, and at least twenty-four hours' notice shall be given to the adverse party or his attorney previous to the making of the application.

Notices of writs of error.

RULE 7. All notices of writs of error, with the ac-

ceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and be by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Reviewing instructions.

RULE 8. In actions at law it shall not be necessary for the purpose of reviewing in the Supreme Court the action of any circuit court or any other court, having, by statute, jurisdiction of civil cases in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the court of first instance be embodied in the bill of exceptions, but it shall be sufficient for the purpose of such review that the bill of exceptions state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instructions founded on it.

Bill of exceptions—whether there was evidence tending to prove an issue.

RULE 9. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the court of first instance shall be of opinion that there was such evidence, it shall be the duty of the court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed to be applicable to such fact or issue, and to except to the opinion of the court that the same tends to prove such fact or issue.

Bill of exceptions—whether there was evidence tending to prove an issue.

RULE 10. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions, detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the court that

it does not so tend, which bill of exceptions shall be allowed by the court by which the cause is tried.

Exceptions to admission or exclusion of evidence.

RULE 11. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

Bill of exceptions in equity cases.

RULE 12. In cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

Rule as to making out transcripts.

RULE 13. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (unless an exception is saved to the regularity of the process, or its execution, or to the acquiring by the court of jurisdiction in the cause), in making out transcripts of the record for the Supreme Court, set out the original or any subsequent writ or the return thereof; but in lieu thereof shall say (e. g.) "summons issued October 2, 1871, executed October 5, 1871," and if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleading as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter touching the organization of the court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by the bill of exceptions.

Presumptions in support of bills of exceptions.

RULE 14. The only purpose of a statement, in a bill of exceptions, that it sets out all the evidence in a cause, being that the Supreme Court may have before it the same matter which was decided by the court of first instance,

it shall be presumed as a matter of fact in all bills of exceptions, for the future, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Abstracts and briefs to be filed.

RULES 15 and 16 (as consolidated and amended at the April term, 1884). In all cases the appellant or plaintiff in error shall file with the clerk of this court on or before the day next preceding the day on which the cause is docketed for hearing, seven copies of an abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for the respondent or defendant in error, at least *thirty* days before the day on which the cause is docketed for hearing; and the counsel for the respondent or defendant in error shall, at least *ten* days before the day the cause is docketed for hearing, deliver to the counsel for appellant or plaintiff in error, one copy of his brief, points and authorities cited, and such further abstract of the record as he may deem necessary, and shall on or before the day next preceding the day on which said cause is docketed for hearing, file with the clerk of this court seven copies of the same, and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the clerk.

Citing authorities in briefs.

RULE 17. In citing authorities, in support of any proposition, it shall be the duty of the counsel to give the names of the parties to any case cited from any report of the adjudged cases, as well as the number of the volume and the page where the same will be found; and when

SUPREME COURT RULES.

v

reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, section, paging and side paging shall be set forth.

Appellant's brief to allege errors complained of.

RULE 18. The brief filed on behalf of the appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted at the argument to errors not thus specified, unless for good cause shown the court shall otherwise direct.

Failure to comply with rules 15 and 16.

RULE 19. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with rules numbered 15 and 16, the court, when the cause is called for hearing, will dismiss the appeal or writ of error; or at the option of respondent or defendant in error, continue the cause at the costs of the party in default.

Agreed cases.

RULE 20. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defence and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligibly present to the Supreme Court, or any appellate court, the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in all appellate courts, and the judgment rendered in the court of first instance shall be affirmed or reversed according to the opinion entertained by the Supreme Court respecting the same.

Motion for rehearing.

RULE 21. Motions for a rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute,



or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel, but no motion for a rehearing shall be filed after the final adjournment of the court.

Motion for affirmance.

RULE 22. On motion for affirmance under section 49, article 13, chapter 110, Wagner's Statutes, the mere fact that the appellant has on file, or presents a copy of the transcript at the time such motion is made, shall not *of itself* be deemed "good cause" within the meaning of said section.

Former rules rescinded.

RULE 23. All rules not included in the foregoing enumeration are hereby rescinded.

ADDITIONAL RULES.

RULE 24. No writ of error from this court to the court of appeals can be issued by the clerk of this court in vacation. All applications in term time for writs of error to the court of appeals, shall be accompanied by an affidavit of the attorney of record that the cause in which such writ of error is sued out, is one of which this court has appellate jurisdiction under section 12, of article 6 of the constitution; and such affidavit shall state the facts

conferring such jurisdiction, and thereupon the clerk shall issue such writ. (*Adopted at the April term, 1878*).

RULE 25. That hereafter, in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause. (*Adopted at the October term, 1878*).

RULE 26. A party, in any cause, filing a motion either to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter or by written notice, and shall, on filing such motion, satisfy the court that such notice has been given. (*Adopted at the October term, 1879*).

RULE 27. All briefs of counsel shall hereafter contain, separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. And any brief failing to comply with this rule may be disregarded by the court. (*Adopted at the April Term, 1886*).